IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDSEY L. WILLIAMS and
AMY L. WILLIAMS,
Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant and
Counterclaimant.

v.

LINDSEY L. WILLIAMS,

Counterclaim
Defendant.

No. 90-C-1-B

ORDER

THIS MATTER comes on for consideration upon Defendant's Motion for Summary Judgment. In this action, the plaintiff[1] seeks a refund of $100.00, which is partial payment of an assessment by the United States under 26 U.S.C. §6672. The United States counterclaims for $56,096.25, the unpaid balance of the assessment, plus the appropriate statutory additions.

The undisputed facts[2] are as follows:

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[1] Plaintiff Amy L. Williams has been dismissed from this lawsuit.

[2] The plaintiff, in his brief in opposition to defendant's motion for summary judgment, did not comply with the requirements of Local Rule 15(B) and set forth the material facts as to which the plaintiff contends a genuine issue exists. As the defendant's statement of material facts was not controverted, the facts are deemed admitted for the purpose of summary judgment.
In any case, the plaintiff had already admitted the above facts in the agreed pretrial order filed on February 5, 1991.

On March 2, 1987, a delegate of the Secretary of the Treasury made an assessment pursuant to 26 U.S.C. § 6672 against plaintiff Lindsey L. Williams ("Williams") for $56,196.25, for back taxes owed to the United States under the Federal Insurance Contributions Act (FICA) for the last quarter of 1983 and the first quarter of 1984 (the "applicable periods") by Papeco, Inc. ("Papeco").

Williams was the president and principal stockholder of Papeco from November 1975 to January 1984. As president Williams had the authority to sign checks on behalf of Papeco, pay Papeco's creditors, borrow funds on behalf of Papeco, and hire employees of Papeco. Williams also signed payroll checks for Papeco that were countersigned or initialed by Ivan McFarland.[3] During this time Williams participated in making decisions regarding the payment of creditors and was present at meetings where federal withholding tax liability was discussed. Williams had access to company records and books, and reviewed and caused to be filed the Form 941 tax return for the tax period ending December 31, 1983.

Papeco ceased operations in January 1984 as a result of actions by Town & Country Bank, Papeco's principal creditor. No payroll tax liability accrued after this time.

The following issues are before the court:

1. Whether Lindsey L. Williams was a responsible person regarding the payment of trust fund taxes for Papeco, Inc. for the quarters ending December 31, 1983, and March 31, 1984 and willfully failed to pay said taxes.

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[3]Ivan McFarland was comptroller of Papeco from 1981 until early May 1983 when he resigned his position and became an independent CPA for Papeco at the request of Town & Country Bank.

2. If so, what is the amount of taxes and statutory additions for which the plaintiff is liable?

In order to be found personally liable under 26 U.S.C. §6672, one must be a "responsible person" and must have been "willful" in his/her failure to collect, truthfully account for, or pay over the withheld taxes.

The United States contends that the undisputed facts prove that Williams was a person required to collect, truthfully account for, and pay over trust fund taxes of Papeco, Inc. for the tax periods ending December 31, 1983 and March 31, 1984 and that he willfully failed to do so. The United States also argues that the assessment entered into the record as Defendant's Exhibit 1 to the Memorandum in Support of United States' Motion for Summary Judgment is prima facie valid because the plaintiff has not shown that the assessment is incorrect. The United States, therefore, contends that it should be granted summary judgment on plaintiff's liability in the amount of the assessment, plus any applicable statutory additions.

Plaintiff claims that he was neither the "responsible person" nor "willful" in withholding Papeco's unpaid taxes. Plaintiff claims that Town & Country Bank had assumed control of Papeco pursuant to a loan agreement. Plaintiff asserts that he could only sign checks approved by Town & Country Bank; therefore, he was merely acting as an agent for Town & Country Bank. Further, plaintiff asserts that he was not aware that payroll taxes were not being forwarded to the Internal Revenue Service during the applicable periods. Finally, plaintiff states that the United

States cannot prove that he was responsible after January 1984, because the plaintiff served as Papeco's president and principal stockholder only through January 1984.

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Windon Third Oil and Gas Drlling Partnership v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element to that party's case, and on which that party will bear the burden of proof at trial.

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). In determining whether a factual issue exists, the court must consider all evidence in the light most favorable to the non-moving party. Adickes v. S.H. Kress and Company, 398 U.S. 144 (1970).

From the undisputed facts in the record, the Court concludes that Williams was a "responsible person" and his failure to collect, truthfully account for, or pay over the withheld taxes was "willful" during the last quarter of 1983 until January 1984, when his position as president of Papeco terminated. However, the Court

cannot find as a matter of law that the plaintiff was a "responsible person" from February 1, 1984 through March 31, 1984.

The plaintiff relies on Papeco's loan agreement with Town & Country Bank to abrogate his responsibility under §6672. However, the loan agreement is not in the record; but even if it were and stated what is represented by the plaintiff, the Court finds that the agreement would not excuse the plaintiff of his responsibility.

In Kalb v. United States, 505 F.2d 506 (2nd Cir. 1974), cert. denied, 421 U.S. 979 (1975), a company in financial difficulty reached a agreement with its principal creditor, Banker's Trust Company, to continue its credit provided that the bank would oversee the company's financial operations. When the IRS made an assessment against the plaintiffs, the corporate officers claimed they were not the "responsible persons" because Banker's Trust Company had the power to oversee the financial operations. The court in finding the officers to be the "responsible persons" stated:

> . . . it is undisputed that appellants [officers of company] voluntarily entered into and at all times acceded to the arrangement.
>
> Appellants concede that any power the bank may have had to select which creditors should be paid was granted by appellants as part of the consideration for the bank's continuing financing. . . . Appellants maintained legal control of the company, including the power to sign checks. Appellants were always free to rescind the agreement if it involved them in breaches of their duties. . .
>
> To permit corporate officers to escape liability under section 6672 by entering into agreements which prefer other creditors to the government would defeat the entire purpose of the statute.

Id. at 510.

The plaintiff's role as a "responsible person" is even more compelling in the instant case. It is undisputed that after Town & Country Bank allegedly took control of Papeco, Williams personally continued to participate in making decisions regarding the payment of creditors, and reviewed and caused to be filed the Form 941 tax return for the tax period ending December 31, 1983.

Williams also argues that his lack of authority after Town & Country Bank's "take-over" is further evidenced by the required cosignatory of Ivan McFarland on Papeco's payroll checks during the applicable periods. However, in Burack v. United States, 461 F.2d 1282 (Ct.Cl. 1972), the court decided for the defendant in a tax assessment against the vice-president of a New York corporation who only had the authority to cosign checks for the corporation. The court, in concluding the vice-president was "responsible" and "willful" stated that the "[a]uthority to cosign in effect gives one the authority to decide which creditors should be paid." Id. at 1291. Similarly, although McFarland's initials were required on payroll checks signed by Williams, such does not negate Williams' authority to sign the checks.

Finally, Williams contends that he was not "willful" within the meaning of §6672. The Tenth Circuit, in Burden v. United States, 486 F.2d 302 (10th Cir. 1973), cert. denied, 416 U.S. 904 (1974), defined willfulness under the statute as

> . . . a voluntary, conscious and intentional decision to prefer other creditors over the Government. . . .It does not require bad motive as in a criminal case.

Id. at 304 (citations omitted).

However, Williams does not dispute that he participated in

making decisions regarding the payment of creditors, was present at meetings where federal withholding tax liability was discussed, had access to company records and books, and reviewed and caused to be filed the Form 941 tax return for the tax period ending December 31, 1983. The Court concludes that these uncontested facts establish Williams' "voluntary, conscious and intentional decision to prefer other creditors over the Government."

Although the Court concludes that there are no genuine issues of material fact concerning Williams' responsibility and willfulness under §6672 while he was president of Papeco, this is not true after Papeco ceased operations in January 1984. The Court, therefore, grants defendant's motion for summary judgment in part, finding Williams a "responsible person" who willfully failed to collect, truthfully account for or pay over taxes through the last quarter of 1983, and denies the motion in part, concluding that genuine issues of material fact remain concerning Williams' liability after December 31, 1984, as well as the amount of tax due for the applicable periods.

The Court sets the matter for jury trial on the remaining issues of fact for May 18, 1992 at 9:30 a.m..

IT IS SO ORDERED this 31st day of March, 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 31

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NICKS, GERALD D., ET AL,

Plaintiff,

v.

Fibreboard Corporation, et al,

Defendants.

Case No. 88-C-304-B

ADMINISTRATIVE CLOSING ORDER

The defendants, H. K. Porter Co., Inc., Eagle-Picher Industries, Inc., Celotex Corporation, and Raymark Industries, Inc. having filed their petitions in bankruptcy and these proceedings being stayed thereby, and settlement or dismissal having been attained as to the remaining defendants, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 31st day of Mar., 1992.

Thomas R. Brett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 31 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CARLTON, GUFFREY, ET AL,

Plaintiffs,

v.

Fibreboard Corporation, et al,

Defendants.

Case No. 88-C-112-B

ADMINISTRATIVE CLOSING ORDER

The defendants, H. K. Porter Co., Inc., Eagle-Picher Industries, Inc., Celotex Corporation, and Raymark Industries, Inc. having filed their petitions in bankruptcy and these proceedings being stayed thereby, and settlement or dismissal having been attained as to the remaining defendants, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 31st day of March, 1992.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MID-CONTINENT CASUALTY COMPANY, an Oklahoma corporation,

Plaintiff,

v.

FRANK G. LUCA and CARMELA LUCA,

Defendants,

and

STAR PRODUCTION, INC., d/b/a TEX-STAR PRODUCTION,

Intervenor.

No. 91-C-538-B

O R D E R

Before the Court for decision are the various Motions for Summary Judgment under Fed.R.Civ.P. 56 of Plaintiff, Defendants and Intervenor concerning the issues of liability insurance coverage .

Plaintiff, Mid-Continent Casualty Company ("MCC"), commenced this action for declaratory judgment asserting its general liability insurance policy GL 131019 to Aries Exploration Co. Inc. ("Aries") from January 31, 1990 to January 21, 1991, extended no coverage to Frank G. Luca and Carmela Luca, principal officers of Aries, regarding Aries' production of oil from a zone (0 feet to 2,000 feet) to which it was not entitled, constituting conversion/trespass. The Defendants, Frank G. Luca and Carmela Luca ("Luca"), and Intervenor, Star Production, Inc. ("Star"), judgment-creditor of Luca for conversion, assert there is coverage under the subject liability policy, waiver and estoppel, and bad faith on the part of MCC.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

The material facts not in dispute making the matter ripe for summary judgment are as follows:

Aries acquired a portion of the subject oil and gas leasehold estate in Seminole County, Oklahoma which excluded formations from the surface to 2,000 feet. Aries commenced drilling Luca No. 1 well in late October or early November 1989. On December 16, 1989, Aries started producing oil from its Luca No. 1 well from the forbidden zone, contrary to the objection of the forbidden zone oil and gas leasehold owners, the Intervenor interests.

The forbidden zone leasehold owners commenced an action in the

District Court in and for Seminole County, Oklahoma, Case No. S-C-90-16, styled Jaco, et al., vs. Aries, et al., and on February 5, 1990, obtained a temporary restraining order against Aries concerning production from the Luca No. 1. The production continued until February 16, 1990.

The state court lawsuit against Aries and the Lucas sought to quiet title in the oil and gas leasehold estate from the surface to 2,000 feet, an accounting, money judgment for conversion, punitive damages for conversion and trespass, and injunctive relief.

On August 14, 1990, judgment was entered in the state court action in favor of Plaintiffs, quieting their title in the oil and gas leasehold estate between the surface and 2,000 feet.

MCC issued a general liability policy, GL 131019, to Aries Exploration Co. Inc., with a policy period from January 31, 1990 to January 31, 1991. (Exhibit A to Plaintiff's Complaint) (It should be noted production from the Luca No. 1 was from December 16, 1989 until February 16, 1990, and the insurance policy period commenced January 31, 1990). The pertinent language of the liability insurance policy is attached hereto as Appendix 1.

Final pretrial conference was set in the state court case for March 15, 1991. In the pretrial order (Plaintiff's Exhibit 2) filed on March 15, 1991, approved by all counsel and the court, it stated at page 4, paragraph j and k:

> "j. The Aries defendants admit they have operated the Luca No. 1 well in such a manner as to commingle [sic] its production with production from other wells in its vicinity so that the actual production from the Luca No. 1 well can not be determined with reasonable

certainty. Note, the mineral owners are the same on all the wells in the 60 acres.

"k. The 'ARIES' defendants admit that a substantial sum of money in excess of $10,000.00 has been received by them for production from the wells in formations to the depth owned by Plaintiffs which money is the property of Plaintiffs and other working interest owners."

Thus, the issue for jury trial set for April 15, 1991 was compensatory damages for the already adjudicated conversion and for alleged punitive damages.

MCC first learned of the dispute and the litigation which had been ongoing for more than a year previous on March 14, 1991, the day before the state court action pretrial conference. MCC responded by a telephone call to Aries' attorney on March 14, 1991, and a general reservation of rights letter dated March 18, 1991 (Plaintiff's Exhibit 6 attached hereto as Appendix 2).

MCC employed counsel to associate with Aries' counsel in trial of the case. Weeks were required for MCC's counsel to get up to speed in reviewing the record and in preparing to try the issue of damages in this ongoing relatively complex case. In a statement given to MCC's representative in early June 1991, Frank Luca stated he could determine the actual production from Luca No. 1 in spite of it having been commingled with other production. (Plaintiff's Exhibit 11). This statement was contrary to the previous pretrial order stipulation and relevant to the alleged conversion damage determination.

A new jury trial date was set on June 14, 1991. On June 11, 1991, before trial, MCC sent a more specific reservation of rights

letter regarding noncoverage for property damage and personal injury, late notice, and asserted no coverage for alleged punitive damages. (Plaintiff's Exhibit 12 attached hereto as Appendix 3).

By way of their counsel's letter of June 4, 1991 (Plaintiff's Exhibit 10), MCC was requested to also provide a defense to Frank G. Luca and Carmela Luca who were sued individually and by Oklahoma law could be responsible personally as principal officers of Aries. Aries filed for bankruptcy on June 11, 1991, so Aries was not a party at the trial of the case.

A jury verdict was rendered on June 18, 1991, in favor of the Plaintiffs (Intervenor) and against Frank G. Luca and Carmela Luca for conversion damages in the amount of $250,370.51. No punitive damages were awarded. MCC's designated counsel, along with Luca's counsel, joined in defense of the trial of the case. In its Instruction No. 3 to the jury, the court stated in part:

> "Defendants have drilled and produced the Luca No. 1 well from formations above 2,000 feet. The oil produced above 2,000 feet in the Luca No. 1 well belongs to the plaintiffs."

The instructions given by the court concerned damages for conversion as well as alleged punitive damages. The court further instructed that if the jury found the Defendants acted as innocent trespassers, they would be entitled to credit for lifting costs. The jury's verdict was for the full amount of the conversion damages claimed and reflected no credit for lifting costs but awarded no punitive damages. In keeping with the earlier pretrial order ruling, the court instructed the jury that production from Luca No. 1 having been commingled with production from other wells

and not subject to specific quantification, entitled Plaintiffs to damages for the value of all commingled oil sold by the Defendants from the common tank battery during the applicable period.

THE PARTIES CONTENTIONS RELATIVE TO THEIR MOTIONS FOR SUMMARY JUDGMENT

MCC asserts there is no property damage or personal injury coverage under the subject insurance policy, the Underground Resources and Equipment Exclusion applies, and MCC was prejudiced by late notice.

The Lucas contend the personal injury coverage applies, the Underground Resources and Equipment Exclusion is inapplicable, MCC suffered no prejudice from the late notice, waiver and estoppel apply to provide coverage, and MCC was guilty of bad faith in denying coverage.

The Intervenor, Star, asserts there is both property damage and personal injury coverage under the policy, MCC is estopped to assert the Underground Resources and Equipment Exclusion, and waiver and estoppel apply to MCC's late notice insurance policy defense.

The Court will discuss the various claims and defenses concerning the policy coverage in the following order: Property damage coverage, personal injury coverage, the late notice question, waiver and estoppel, and the Underground Resources and Equipment Exclusion.

The Court concludes the facts giving rise to the claim for producing oil from the forbidden formation (0 feet - 2,000 feet) do not constitute an "occurrence" or "property damage" as defined in

the general liability insurance policy. The pertinent language of the general liability states:

> COVERAGE B -- PROPERTY DAMAGE LIABILITY
>
> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> * * *
>
> B. property damage
>
> to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such ... property damage. . . .
>
> Occurrence is defined in the policy as:
>
> An accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured; . . . .
>
> Property damage is defined in the policy as:
>
> (1) Physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
>
> (2) Loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

The damage claimed was the wrongful appropriation (conversion) of the claimants' oil. There was no claim the oil was actually damaged in any way.

Aries, acting through its officers and after seeking advice of counsel, deliberately chose to perforate above 2,000 feet and

commenced oil production six weeks before the effective date of the insurance policy. Production was deliberately continued about 16 days into the policy period.

As was noted in Nortex Oil & Gas Corp. v. Harbor Insurance Co., 456 S.W.2d 489, 493 (Tex.App. 1970):

> "There is a material difference between 'property taken' and 'property damaged.'"

Nortex also stated at page 493:

> ". . . The insurer did not contract to indemnify the insured for disgorging that to which it was not entitled in the first place, or for being deprived of profits for which it was not entitled."

Other cases holding that conversion is not property damage within a general liability insurance policy are: Lay v. Aetna Insurance Company, 599 S.W.2d 684 (Ct.App. Tex. 1980, reh'g denied June 11, 1980); B & L Furniture Co. v. TransAmerica Insurance Co., 480 P.2d 711, 712-713 (Or. 1971); and Inland Construction Corp. v. Continental Casualty Company, 258 N.W.2d 881 (Minn. 1977).

Concerning personal injury coverage, the general liability insurance policy in pertinent part provides:

> "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of personal injury . . . .to which this insurance applies."
>
> Personal injury as defined in the policy means injury arising out of:
>
> "2. Wrongful entry or eviction or other invasion of the right of private occupancy."

In analyzing such language, the Court in Martin v. Brunzelle, 699

F.Supp. 167 (N.D. Ill. 1988) said at page 170:

> "Other invasion of the 'right of private occupancy' is simply part of a more complete definition of 'personal injury,' following directly on the heels of 'wrongful entry or eviction." *Ejusdem generis* principles draw on the sensible notion that words such as 'or other invasion of the right of private occupancy' are intended to encompass actions of the same general type as, though not specifically embraced within, 'wrongful entry or eviction.' Those two terms have commonly understood meanings."

Employing similar analysis, the Court in Waranch v. Gulf Insurance Company, 266 Cal.Rptr. 827 (Cal.App. 2 Dist. 1990) stated at page 828:

> ". . . Occupancy ordinarily refers to 'the taking and holding possession of real property under a lease or tenancy at will.' . . . The association of 'occupancy' with real property in the instant case is reinforced by its conjunction with the words 'wrongful entry or eviction.' 'Eviction' is a term almost exclusively associated with real property. . . We perceive that the 'personal injury' contemplated by the business liability policies was the 'wrongful entry, eviction or other invasion of the right of private occupancy' relating to some interest in real property . . . This court 'will not indulge in a forced construction so as to fasten a liability on the insurance company which it has not assumed.'"

The insured's right of private occupancy is not implicated in this conversion action. Aries had the right to drill through the forbidden zone (0 to 2,000 feet) but no right to extract the oil therefrom.

Under Oklahoma law, oil in place in the earth is not subject to ownership in place apart from land in which it is found. At

such time as it is actually reduced to possession it is categorized as personalty, not as real property. *See,* Alexander v. Continental Petroleum Company, 63 F.2d 927 (10th Cir. 1933); Feely v. Davis, 784 P.2d 1066 (Okl. 1989); Champlin Exploration, Inc. v. Western Bridge and Steel Co., Inc., 597 P.2d 1215 (Okl. 1979); and De Mik v. Cargill, 485 P.2d 229 (Okl. 1971). Oil cannot be "occupied" as can lands or buildings and neither can it be possessed while in the earth in the natural state. By the terms of the general liability insurance policy and the operative facts herein, no personal injury coverage is extended because there was no invasion of a party's right of private occupancy.

Concerning the issue of late notice, MCC was notified of the alleged loss event or claim over a year late which was the day before the final pretrial conference in the state court litigation. Aries and the Lucas already had attorneys at that point and they admitted in the pretrial conference order of March 15, 1991 the conversion of oil had occurred and it had been commingled with other production in such a way to be undistinguishable. The approved pretrial order also stated that discovery was complete and settlement was not possible. The only issue remaining for trial was that of compensatory and alleged punitive damages. Shortly before trial Frank Luca advised MCC's representative, contrary to prior stipulation, that the Luca No. 1 well oil produced was distinguishable. Thus, the material facts not in dispute establish that MCC was prejudiced in being foreclosed from conducting a meaningful investigation, conducting discovery, and from developing

meaningful defensive evidence. The Lucas have never offered a reason for their failure to make a timely notification to MCC.

Oklahoma case law has upheld insurance policy provisions which require prompt notice to the insurer of an occurrence as well as prompt notice of any lawsuit brought thereon against the insured. Dixon v. State Mutual Insurance Company, 126 P. 794 (Okl. 1912).

The applicable notice provisions of the general liability insurance policy involved herein state as follows:

> 4. INSURED'S DUTIES IN THE EVENT OF OCCURRENCE, CLAIM OR SUIT:
>
> (A) In the event of an occurrence, written notice containing particulars sufficient to identify the insured, and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.
>
> (B) If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.
>
> 5. ACTION AGAINST COMPANY: No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

If the insurer is prejudiced by the late notice, coverage under the policy will be defeated. Continental Casualty Company v. Beaty, 455 P.2d 684 (Okl. 1969), and Fox v. National Savings Insurance Company, 424 P.2d 19 (Okl. 1967). *See also,* Montgomery, D.O. v. Professional Mutual Insurance Company, 611 F.2d 818 (10th

Cir. 1980); Dairyland Insurance Company v. Marez, 601 P.2d 353 (Colo.App. 1979), *aff'd*, 638 P.2d 286 (Colo. 1982).

It is unnecessary for the court to pass on the insurer's late notice defense because the Court has found no coverage under the terms of the general liability insurance. However, the undisputed facts in the record strongly indicate that if there were coverage, it was vitiated by the prejudicial late notice given the insurer by the insured.

The Court concludes the assertions of waiver and estoppel by the Defendants and Intervenor are inapplicable from the record before the Court. The case of Steiger v. Commerce Acceptance of Oklahoma City, Inc., 455 P.2d 81, 83 (Okl. 1969), gives the following definition of waiver and estoppel:

> "4. . . . Waiver involves the notion of an intention entertained by the holder of some right to abandon or relinquish instead of insisting on the right. An estoppel arises when the purpose of natural consequence of a person's representations or conduct is such as to induce another person to do or to omit such act the doing or omission of which would turn out to his detriment and to the inducing party's benefit if the latter were permitted to take advantage of it. . . ."

The asserted estoppel can be disposed of rather summarily because the record does not reveal any detrimental reliance. The insurer simply defended the state court action under a reservation of rights. The Lucas' personal counsel appeared at the trial along with the insurer's selected counsel on behalf of the Lucas. The only issue presented at the trial was that of damages because the liability for conversion of the oil had already been determined

before the insurer's counsel appeared in the case.

The March 18, 1991 reservations of right letter (Plaintiff's Exhibit 6 - Appendix 2 hereto) does include general reservation of rights language and states the first notice was given on March 15, 1991. This complex multiparty lawsuit had been ongoing for over a year so the insurer was entitled to have a reasonable time before trial to investigate the facts, claims and defenses. The insurer followed up with its more specific reservation of rights letter of June 11, 1991 (Appendix 3 hereto) following the demand of Lucas' counsel to provide a defense and coverage to them in addition to Aries.

In its further reservation of rights letter of June 11, 1991 (Appendix 3 hereto), MCC's representative stated:

> ". . . The facts leading to this litigation and the facts concerning the lawsuit and the coverage implications on the general liability policy are still evolving at this time. . . ."

Therein, MCC commented further concerning the untimely notice, and stated factual questions still remained concerning coverage issues relating to "property damage," "bodily injury," and "personal injury." It was in this second reservation of rights letter that a copy of the Underground Resources and Equipment coverage endorsement was furnished to Aries and the Lucas.

The doctrines of waiver and estoppel are not available to bring within coverage of an insurance policy risks not covered by its terms, or risks expressly excluded therefrom. Lester v. Sparks, 583 P.2d 1097, 1100 (Okl. 1978); Catts Co. v. Gulf Ins. Co., 723 F.2d 1494, 1501 (10th Cir. 1983); and Western Insurance

Company v. Cimarron Pipe Line Construction, Inc., 748 F.2d 1397, 1399 (10th Cir. 1984).

As stated in the cases of Seidenbach's v. Underwood, 63 P.2d 950, 954 (Okl. 1937), and in Zahn v. General Ins. Co. of America, 611 P.2d 645 (Okl. 1980), the doctrine of waiver is often difficult in application; each case involving the question must be decided upon its own peculiar facts. The waiver cases urged by the Defendants and the Intervenor herein are clearly distinguishable from the facts in the instant matter. There is no evidence in the record that MCC voluntarily relinquished a known right relative to coverage extended, or not extended, to the insured under its general liability insurance policy.

Concerning the Underground Resources and Equipment exclusion, the Court has serious doubt that it applies to the claim for oil conversion damages herein, but it is unnecessary to decide this issue in view of the Court's findings and conclusions above.

For the reasons set out above, the Motion for Summary Judgment of the Plaintiff MCC is hereby SUSTAINED and the Motions for Summary Judgment of the Defendants, Frank G. Luca and Carmela Luca, and Intervenor Star, are hereby OVERRULED. A separate Judgment in keeping with the Court's order sustaining the Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56 of the Plaintiff, Mid-Continent Casualty Company, shall be entered contemporaneous herewith.

DATED this 27th day of March, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

MID-CONTINENT CASUALTY COMPANY, POLICY GL 131019

COVERAGE A -- BODILY INJURY LIABILITY

COVERAGE B -- PROPERTY DAMAGE LIABILITY

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

A. bodily injury or

B. property damage

to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage . . . .

Occurrence is defined in the policy as:

> An accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured; . . . ."

Property damage is defined in the policy as:

(1) Physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or

(2) Loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

* * *

The Notice provisions of the policy specify:

4. INSURED'S DUTIES IN THE EVENT OF OCCURRENCE, CLAIM OR SUIT:

(A) In the event of an occurrence, written notice containing particulars sufficient to identify the insured, and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.

(B) If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

5. ACTION AGAINST COMPANY: No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

* * *

The policy also contained personal injury coverage which provided:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of personal injury . . . to which this insurance applies.

Personal injury as defined in the policy means injury arising out of:

> 2. Wrongful entry or eviction or other invasion of the right of private occupancy.

* * *

Policy endorsement Form L9465, the Underground Resources and Equipment Exclusion, relative to "property damage" provides in relevant part:

> It is agreed that with respect to operations performed by or on behalf of the named insured and described in this endorsement:
>
> The insurance does not apply to:
>
> A. Property damage included within the Underground Resources and Equipment Hazard;
>
> B. "Underground Resources and Equipment Hazard" includes property damage to any of the following:

a. Oil, gas, water, or other mineral substances which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water;

b. Any well, hole, formation, strata, or area in or through which exploration for or production of any substance is carried on; . . . .

MID CONTINENT
MC
CC
· Mid-Continent Casualty Group

OKLAHOMA SURETY COMPANY

Post Office 18836 Shartel Station Oklahoma City, OK 73154 405-528-0556 Fax 405-528-8205

March 18, 1991

Aries Exploration Company, Inc.
P. O. Box 1492
Seminole, Oklahoma 74868

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

RE: Claim #5-27063H
Insd: Aries Exploration Co. Inc.
Clmt: Star Production, et al.
D/A: 2-90

Gentlemen:

The lawsuit involving case #S-C-90-16, filed within the Dist. Court of Seminole County, styled, Jaco Production Co., et al. vs. Aries Exploration Co., Inc., et al. and specifically a copy of the plaintiff's Fourth Amended Petition, and incidentally this being our first notice of the allegations setforth therein was received by this office on March 15th, 1991. Please be advised that this Fourth Amended Petition has been forwarded to our attorneys, Huckaby, Fleming, Frailey, Chaffin & Darrah, to the attention of Attorney Michael Darrah located at 1215 Classen Drive, Oklahoma City, Oklahoma 73103, phone #(405) 235-6648.

We are instructing our above attorney to proceed and provide you with a defense, under Reservation, however, and hereby give notice to you that in providing a defense on your behalf to the above styled lawsuit, the Mid-Continent Casualty Company specifically reserves unto itself the right to set up a defense of non-coverage under policy GL 131 019, effective 1-31-90 to 1-31-91 written through the Sturdivant Insurance Agency of Tulsa, Oklahoma.

Your policy GL 131 019 is written on an "occurence" basis, with "occurrence" being defined as an accident, including continuous or repeated exposures to conditions which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured. Various allegations within the described Petition would not appear to fall within the purview of the definition of "occurrence".

Appendix 2

You are, therefore, notified that no action on behalf of the Mid-Continent Casualty Company by way of its said investigation or defense under Reservation shall be construed as an admission of liability or of coverage under the above described policy.

We also wish to call your attention to the fact that this suit has been brought, praying for an undetermined amount while your policy affords a single limit of liability in the amount of $500,000.00. The lawsuit also prays for punitive damages which, of course, are not covered under the insurance contract.

This is, therefore, to advise you that you may, if you care to, and at your own expense, retain attorneys of your own choosing to protect your interests with reference to the distinct possibility that no coverage will be afforded to you under the above described policy, as well as the punitive damages which are being prayed for, however, not covered under the above described insurance policy. It is not the intent of this correspondence to advise you that you must retain such attorneys, but merely to point out to you your rights. It may be necessary from time to time for Attorney Mike Darrah and/or his associates, or a representative of the Mid-Continent Casualty Company to call upon you for additional information in connection with the defense of this case under Reservation, or to appear for a deposition, or for the trial of the case, and we sincerely hope that you will cooperate with them towards a successful disposition of this matter.

We would also like to point out that it would be to our respective best interests if you visit with no one about the case at issue other than Attorney Mike Darrah and/or his associates, a representative of the Mid-Continent Casualty Company,, or your own personal attorney.

Should you have any further questions, please feel free to give us a call.

Yours very truly,

MID-CONTINENT CASUALTY COMPANY

Phil Gottschalk
Claims Manager

PG/wr

cc: Huckaby, Fleming, Frailey, Chaffin & Darrah
Home Office, Claims

MID CONTINENT
Mid-Continent Casualty Group
OKLAHOMA SURETY COMPANY
Post Office 1409 Tulsa, Oklahoma 74101 (918) 587-7221 Fax 918 585-3304

June 11, 1991

Mr. Tim Dowd
Attorney at Law
100 Colcord Building
Oklahoma City, Oklahoma 73102

Re: Claim No.: 527063
Insured: Aries Exploration, Inc.
Claimant: Starr Production, et al

Dear Mr. Dowd:

Thank you for your telephone conversations of June 10 and 11, 1991 and your letter of June 4, 1991.

We appreciate your assistance in contacting Mr. Luca and having him made available for the statement taken by Mr. Eldon Huckaby on June 7, 1991.

My understanding of the history of this case is that it has been pending since April, 1990. There have been a number of hearings including one in January, 1991 at which time the court issued an order finding liability against Aries Exploration Co. for conversion of oil as a result of drilling activities by Aries Exploration on the Luca No. 1 well. You have advised that the conversion statute mandates that the damages be based upon the highest fair market value of the oil during the period of conversion. The spot market for oil during the claim period of conversion rose as high as $39.00 a barrell. I understand that this has been taken on appeal.

The trial scheduled for Friday June 14, is to consider compensation and punitive damages only.

Mid-Continent hired Mike Darrah to defend this case. Mike has been preparing the case for trial on June 14. The facts leading

to this litigation and the facts concerning the lawsuit and the coverage implications on the general liability policy are still evolving at this time. Mid-Continent will continue to defend the case with its reservation of rights because all of the facts impacting on the general liability coverage are not known, timely notice of the lawsuit was not given to Mid-Continent and prejudice to the policy may have resulted from the order concerning the conversion when no notice was given to Mid-Continent Casualty and because questions of what would constitute "property damage" or "bodily injury" or "personal injury" remain unanswered.

A copy of the underground resources and equipment coverage endorsement was faxed to your office June 10, 1991. This endorsement may impact upon what could be considered property damage due to the conversion found in this lawsuit. A copy of this endorsement is enclosed. Whether this endorsement becomes applicable also depends upon a complete gathering of facts. A copy of the insurance contract will be coming to you under seperate cover.

Mid-Continent will continue the defense of this case in its entirety. We feel our duty is to faithfully search for coverage in the general liability contract and will continue to do so. We will also keep you advised of the areas where existence of coverage is unclear and welcome any questions at any time.

Yours truly,

MID-CONTINENT CASUALTY COMPANY

Jim Johnson
Attorney

JJ/bc

CC: Frank Luca
c/o Aries Exploration, Inc.

Mike Darrah
Attorney at Law

Phil Gottschalk
Oklahoma City Branch

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILSON, WEYBORN BYRON, ET AL)
)
Plaintiffs,)
)
v.) Case No. 88-C-104-B
)
Fibreboard Corporation, et al,)
)
Defendants.)

ADMINISTRATIVE CLOSING ORDER

The defendants, H. K. Porter Co., Inc., Eagle-Picher Industries, Inc., Celotex Corporation, and Raymark Industries, Inc. having filed their petitions in bankruptcy and these proceedings being stayed thereby, and settlement or dismissal having been attained as to the remaining defendants, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 31st day of Mar., 1992.

Thomas R. Brett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 31

WILLIAMS, TROY CECIL, ET AL

Plaintiff,

v.

Fibreboard Corporation, et al,

Defendants.

Case No. 88-C-103-B

ADMINISTRATIVE CLOSING ORDER

The defendants, H. K. Porter Co., Inc., Eagle-Picher Industries, Inc., Celotex Corporation, and Raymark Industries, Inc. having filed their petitions in bankruptcy and these proceedings being stayed thereby, and settlement or dismissal having been attained as to the remaining defendants, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 31st day of Mar., 1992

Thomas R. Brett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TRAIL, JAMES ALEX, ET AL)
)
Plaintiffs,)
)
v.) Case No. 88-C-93-B
)
Fibreboard Corporation, et al,)
)
Defendants.)

ADMINISTRATIVE CLOSING ORDER

The defendants, H. K. Porter Co., Inc., Eagle-Picher Industries, Inc., Celotex Corporation, and Raymark Industries, Inc. having filed their petitions in bankruptcy and these proceedings being stayed thereby, and settlement or dismissal having been attained as to the remaining defendants, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 31st day of Mar, 1992.

Thomas R. Brett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GERALD DAVIS,

Plaintiff,

vs.

BERTHA MAE EPPERSON,

Defendant.

Case No. 91-383-C

ORDER OF DISMISSAL

NOW on this 31st day of March, 1992, the above matter comes on for hearing before the undersigned Judge upon Plaintiff's Motion for Dismissal With Prejudice, and the Court being fully advised in the premises and upon consideration thereof, finds that Plaintiff's Motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above-captioned case be dismissed.

(Signed) H. Dale Cook

DANIEL B. GOSSETT, OBA 013687
STIPE, GOSSETT, STIPE, HARPER,
ESTES, McCUNE & PARKS
P.O. Box 701110
Tulsa, Oklahoma 74170
(918) 749-0749

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL WAYNE CARNAGEY,

Plaintiff,

vs.

D.M. MacDONNELL, and the CITY OF TULSA,

Defendants.

Case No. 91-C-13-B

O R D E R

This matter comes on for consideration of the Plaintiff, Michael Wayne Carnagey's (Carnagey) Objection to the Report and Recommendation of the Magistrate Judge entered herein February 7, 1992.

This is a civil rights action brought pursuant to 42 U.S.C. § 1983, and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. In his *pro se* Complaint, Carnagey essentially complains, in two counts, of the use of alleged excessive force by a Tulsa police officer resulting from the alleged poor police training by and policies of the City of Tulsa.

Earlier on, the Magistrate Judge entered his Report and Recommendation as to Defendants' Motion For Partial Dismissal. The Magistrate Judge recommended that the Motion be granted and that the pendent claims brought by Plaintiff be dismissed. There being no objection to the Report and Recommendation, this Court adopted and affirmed the Report and entered its Order granting the Motion

for Partial Dismissal and dismissing the pendent claims brought by Plaintiff.

The Court notes that Defendants' earlier Motion For Partial Dismissal related to four issues: (1) This Court lacks jurisdiction over Plaintiff's pendent claims because, as a matter of law, the right to maintain these actions expired before the Plaintiff's complaint was filed. (2) Plaintiff's complaint fails to raise a justiciable issue under the Fifth Amendment to the United States Constitution and fails to state a Fifth Amendment claim upon which relief can be granted. (3) Plaintiff's complaint fails to raise a justiciable issue under 28 U.S.C. Sec. 1343 and therein fails to state a claim upon which relief can be granted. (4) Plaintiff's claims for punitive damages against the City of Tulsa cannot be granted as a matter of law.

The Court concludes only issue (1) above is a pendent claim. Therefore, the Report and Recommendation dated and filed April 22, 1991, and the Order approving and adopting such Report and Recommendation, relates only to issue (1) above, i.e. the pendent claim.

On February 25, 1992, the Magistrate Judge entered a Report and Recommendation as to Defendant City of Tulsa's summary judgment motion relating to the City's excessive force policy.

Plaintiff's Count II charged that the policies of the City of Tulsa and/or the Tulsa Police Department encourage excessive force.

The Magistrate Judge determined that Defendant has met its burden under Rule 56, F.R.Civ.P, Celotex Corp. v. Catrett, 477 U.S.

317 (1986), by making a showing that no evidence exists in the present record to establish Carnagey's alleged claims on Count II. The Magistrate Judge further determined that, after having made such showing, the burden shifted to Carnagey to go beyond the pleadings and by his own affidavits, or by "depositions, answers to interrogatories, and admissions on file" demonstrate "specific facts showing there is a genuine issue for trial". **Celotex**, *supra*.

The Magistrate Judge determined that Carnagey has not met his burden in opposing the Motion for Summary Judgment. Merely restating the initial allegations, without more, is insufficient to meet such burden. **Stevens v. Barnard**, 512 F.2d 876, 879 (10th Cir.1975).

When a non-movant fails to meet such burden, summary judgment is appropriate. Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." **Celotex Corp. v. Catrett**, *supra*; **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); **Windon Third Oil and Gas v. Federal Deposit Insurance Corporation**, 805 F.2d 342 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In **Celotex**, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." **Matsushita v. Zenith**, 475 U.S. 574, 585, 106 S.Ct. 1348, 89 L.Ed.2d 538, (1986).

After a careful review of the record, including the pleadings of the parties, the Court concludes the Report and Recommendation of the Magistrate Judge should be and the same is hereby ADOPTED and AFFIRMED[1]. The Court further concludes Defendant City of Tulsa's Motion for Summary Judgment on Count II should be and the same is hereby GRANTED.

As to the remaining issues in Defendants' Motion For Partial Dismissal, i.e. those issues other than the pendent claim, the Court refers the matter to the Magistrate Judge for a Report and Recommendation thereto.

IT IS SO ORDERED this 31ST day of March, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[1] The Court does not adopt and affirm that portion of the Report and Recommendation which states "As a result, only Count II of the Complaint remains."

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 31 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O'BANION, LINLEY NEAL, ET AL,

Plaintiffs,

v.

Fibreboard Corporation, et al,

Defendants.

Case No. 88-C-385-B

ADMINISTRATIVE CLOSING ORDER

The defendants, H. K. Porter Co., Inc., Eagle-Picher Industries, Inc., Celotex Corporation, and Raymark Industries, Inc. having filed their petitions in bankruptcy and these proceedings being stayed thereby, and settlement or dismissal having been attained as to the remaining defendants, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 31st day of March, 1992.

Thomas R. Brett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GIESEN, JOHN A., ET AL,

Plaintiffs,

v.

Fibreboard Corporation, et al,

Defendants.

Case No. 88-C-492-B

ADMINISTRATIVE CLOSING ORDER

The defendants, H. K. Porter Co., Inc., Eagle-Picher Industries, Inc., Celotex Corporation, and Raymark Industries, Inc. having filed their petitions in bankruptcy and these proceedings being stayed thereby, and settlement or dismissal having been attained as to the remaining defendants, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 31st day of Mar., 1992.

Thomas R. Brett
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 31

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LANCASTER, CHARLES, ET AL,

Plaintiffs,

v.

Fibreboard Corporation, et al,

Defendants.

Case No. 88-C-919-B

ADMINISTRATIVE CLOSING ORDER

The defendants, H. K. Porter Co., Inc., Eagle-Picher Industries, Inc., Celotex Corporation, and Raymark Industries, Inc. having filed their petitions in bankruptcy and these proceedings being stayed thereby, and settlement or dismissal having been attained as to the remaining defendants, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 31st day of Mar., 1992.

Thomas R. Brett

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FILED

FOR THE

NORTHERN DISTRICT OF OKLAHOMA MAR 31

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CAVIN, JERRY REED)
)
Plaintiff,)
)
v.) Case No. 88-C-930-B
)
Georgia Talc Corporation, et al,)
)
Defendants.)

ADMINISTRATIVE CLOSING ORDER

The defendants, H. K. Porter Co., Inc., Eagle-Picher Industries, Inc., Celotex Corporation, and Raymark Industries, Inc. having filed their petitions in bankruptcy and these proceedings being stayed thereby, and settlement or dismissal having been attained as to the remaining defendants, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 31st day of March, 1992

Thomas R. Brett
United States District Judge

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MAR 31 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DENMAN, IRA ROY)
)
Plaintiff,)
)
v.) Case No. 88-C-931-B
)
GEORGIA TALC CORPORATION, ET AL,)
)
Defendants.)

ADMINISTRATIVE CLOSING ORDER

The defendants, H. K. Porter Co., Inc., Eagle-Picher Industries, Inc., Celotex Corporation, and Raymark Industries, Inc. having filed their petitions in bankruptcy and these proceedings being stayed thereby, and settlement or dismissal having been attained as to the remaining defendants, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 31st day of March, 1992.

Thomas R. Brett
United States District Judge

entered

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. DONALD MIKE BURRELL; DEE ANN BURRELL; LARRY LON STOUT; ELIZABETH FAYE STOUT; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 89-C-858-C

FILED

MAR 31 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DEFICIENCY JUDGMENT

This matter comes on for consideration this 31st day of March, 1992, upon the Motion of the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, for leave to enter a Deficiency Judgment. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, Donald Mike Burrell, appears neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that a copy of Plaintiff's Motion was mailed by certified return receipt addressee restricted mail to Donald Mike Burrell, 3603 South 108th East Avenue, Tulsa, Oklahoma 74146, and by first-class mail to all answering parties and/or counsel of record.

The Court further finds that the amount of the Judgment rendered on May 16, 1990, in favor of the Plaintiff United States of America, and against the Defendants, Donald Mike Burrell and

Dee Ann Burrell n/k/a Dee Ann Harrington, with interest and costs to date of sale is $21,887.67.

The Court further finds that the appraised value of the real property at the time of sale was $7,500.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered May 16, 1990, for the sum of $6,736.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on March 23, 1992.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, Donald Mike Burrell, as follows:

Principal Balance as of 5-16-90	$15,210.55
Interest	4,898.21
Late Charges to Date of Judgment	203.20
Appraisal by Agency	300.00
Abstracting	434.84
Publication Fee of First Notice of Sale	159.84
Publication Fee of Second Notice of Sale	150.73
Court Appraisers' Fees	225.00
Ad Valorem Taxes for 1990	99.30
Ad Valorem Taxes for 1991	206.00
TOTAL	$21,887.67
Less Credit of Appraised Value -	7,500.00
DEFICIENCY	$14,387.67

plus interest on said deficiency judgment at the legal rate of _____ percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant, Donald Mike Burrell, a deficiency judgment in the amount of $14,387.67, plus interest at the legal rate of 4.58 percent per annum on said deficiency judgment from date of judgment until paid.

(Signed) H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

KBA/esr

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

STEPHEN S. OWEN, III,

Petitioner,

v.

DOUG NICHOLS and THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Respondents.

92-C-52-B

ORDER

Petitioner's Motion to Dismiss Without Prejudice his application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now before the court for consideration. For good cause shown, the motion is granted.

Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is dismissed without prejudice.

Dated this 31st day of Mar., 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONNA KAY SEXTON and
ROBERT D. SEXTON,

Plaintiffs,

vs.

CONTINENTAL CASUALTY COMPANY
d/b/a CNA,

Defendant.

No. 88-C-1472 B

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 31 day of March, 1992, it appearing to the Court that this matter has been compromised and **settled, this** case is herewith dismissed with prejudice to the refiling of a future action.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN AIRLINES, INC.

Plaintiff,

v.

CRAIG TWEEDY and
LILLIAN GRAHAM,

Defendants.

Case No. 91-C-762-B

O R D E R

This matter comes on for consideration of Plaintiff's, American Airlines, Inc. (American), request for Preliminary and Permanent Injunctions.

Essentially, this is an action wherein American seeks to enjoin the Defendant, Lillian Graham (Graham), and her attorney, Defendant, Craig Tweedy (Tweedy), from seeking to litigate in a state court proceeding (or relitigate, as Plaintiff alleges) the issue whether or not Graham damaged a 4th stage turbine disk[1] owned by a firm called "Ports of Call" while Graham was an employee of Plaintiff, serving in part as a basis of her discharge. The Court will herein recite the chronology of the Graham/Tweedy/American Airlines legal trilogy (Grahams I, II & III).

Graham I

In May, 1986, Graham filed a two-claim Complaint against American in this federal district court, 86-C-516-C, alleging: (1)

[1] part of an airplane engine.

employment sex discrimination and sexual harassment under Title VII of the Civil Rights Act of 1964, 28 U.S.C. 2000e *et seq*, and, (2) a state tort claim for the alleged intentional infliction of emotional distress. In March, 1987, American was granted partial summary judgment on the intentional infliction of emotional distress claim. On August 11, 1989, Judge H. Dale Cook of this court entered Findings of Fact (Nos. 1- 50) and Conclusions of Law, finding against Graham on her Title VII claim. The gist of the Court's findings and conclusions was that Graham did indeed "violate the work rules in question" and that "the preponderance of the evidence demonstrates that plaintiff's rule violations were the cause of her discharge."

The Graham I Court made the following finding, No. 30, which reads:

> 30. On June 7, 1985, Graham worked on a fourth stage turbine disk. She reported a dent to her supervisor. On June 24, 1985, plaintiff received a five day suspension without pay. Graham's grievance was denied on September 30, 1985. (Defendant's Exhibit 70). During trial, plaintiff attempted at length to demonstrate (1) the disk on which she was working belonged to American and was distinct from a disk belonging to Ports of Call, and (2) she did not damage the disk. The Court has concluded that the disk involved was the Ports of Call disk, and that plaintiff damaged it. Under questions from the Court, plaintiff's memory was unclear as to precisely what happened. (*See* Transcript, Vol. V, pp. 486-492). Plaintiff's daughter, Sandra Whiteis, testified at trial that her mother telephoned one day from work, admitting that plaintiff had damaged a turbine disk. Viewing also the testimony of various other eyewitnesses, the Court has concluded that the preponderance of the evidence lies in defendant's favor on this issue.

See, **Graham v. American Airlines, Inc.**, 731 F.Supp. 1494 (N.D. Okl. 1989).

On September 11, 1989, Graham filed a Notice of Appeal and Docketing Statement, appealing the August 11, 1989 Judgment to the Tenth Circuit Court of Appeals. On August 7, 1990, Graham filed her Application to Withdraw Appeal and on August 10, 1990, the Court of Appeals dismissed the appeal.

On August 9, 1990, Graham filed a Rule 60(b), Fed.R.Civ.P. Motion to Vacate the final judgment on grounds of newly discovered evidence and fraud. On November 21, 1990, while Graham's Motion to Vacate was pending, Graham filed a Supplemental Brief in which Graham asserted as a ground of fraud that the 1985 engine repair did not occur and that therefore the finding by the Court that Graham had damaged the disk was in error.

On December 13, 1990, the District Court entered an Order denying Graham's Motion to Vacate. On January 15, 1991, the District Court denied Graham's Motion for Reconsideration. On February 27, 1991, the Court denied Graham's Motion For Clarification. On March 18, 1991, the Court denied Graham's Motion To Reconsider the February 27th Order.

On April 5, 1991, Graham filed an appeal from the denial of the Rule 60(b) Motion. On December 23, 1991, Graham filed her Brief in Chief. American's brief was not due until February 5, 1992. On January 17, 1992, Graham filed a Motion Dismissing the appeal of the denial of the Rule 60(b) motion.

Graham II

On September 8, 1989, approximately 4 weeks after this federal

district court entered its findings and conclusions in Graham I, and three days before she filed her Notice of Appeal in Graham I, Graham commenced, through the efforts of Defendant Attorney Craig Tweedy, a second action in state court (now known as Graham II), which American removed to federal Court, being assigned Case No. 89-C-815-P. On June 13, 1990, this Court granted Graham leave to file an Amended Complaint.

In Graham II, Graham alleged in the Petition that the judgment in Graham I was the result of engine record fraud, perjury by American's witnesses and conspiracy between American, its agents and employee, George Barton, and Graham's union, the Transport Workers Union, and its agent, Dennis Quish, to deprive Graham through fraud and deceit of her employment with American.

On February 21, 1991, Judge Layn R. Phillips of this court entered summary judgment in favor of American and the other Defendants in Graham II on, among other grounds, claim and issue preclusion. Judge Phillips, in his Order, stated:

> "During the course of litigation in Graham # 1 plaintiff repeatedly raised the same allegations of fraud, altered or concealed evidence and perjury which she now asserts as the basis of her claims in Graham # 2."
>
> * * * * *
>
> ". . .those "facts" were previously raised by plaintiff and disposed of by the court in Graham # 1 . . ."
>
> * * * * *
>
> ". . .plaintiff's papers filed in Graham # 1 consider(ed) and dispos(ed) of the same allegations that plaintiff now asserts as the basis of her claims in Graham # 2."

In Graham II, Defendants moved for summary judgment on four alternative grounds: (1) That Graham II was an impermissible

collateral attack on the Graham I judgment; (2) That Graham II was barred by the doctrines of res judicata and collateral estoppel; (3) That each of Plaintiff's four claims in Graham II is legally insufficient; and (4) That Plaintiff's claims for breach of contract/breach of duty of fair representation are barred by a six month statute of limitations. The Graham II Order stated:

> "The court believes summary judgment is warranted in this case on all of the alternative grounds set forth in defendants' motion and brief. However, for the purposes of this order the court concludes it is unnecessary to base its decision on each of the alternative grounds because this action is an impermissible collateral attack on the prior judgment in Graham # 1, and further because the claims raised in this action either were, or could have been, raised in Graham # 1 and therefore are barred by the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion).
>
> Plaintiff's two response briefs, although replete with allegations of lying, cheating and concealing evidence, are woefully inadequate in responding to defendants' legal arguments."

The Graham II Order, relying upon **Travelers Indem. Co. v. Gore**, 761 F.2d 1549, (11th Cir. 1985), held that Graham could not relitigate the issues of intrinsic fraud, perjury and forging or altering evidence, decided against Graham in Graham I. The Court further held that relief from intrinsic fraud must be made by direct attack in the same case in which the fraud was allegedly committed, and a party cannot use an independent action as a vehicle to relitigate issues. The Graham II Order further stated that allegations of perjury, forged and altered documents and concealed evidence raise issues of intrinsic fraud, citing **Wood v.**

McEwen, 644 F.2d 797, 801, (9th Cir. 1981) *cert. den.* 455 U.S. 942, which, "to lay a foundation for an independent action, (it) must be such that it was not an issue in the former action nor could it have been put in issue by the reasonable diligence of the opposing party.", citing **Travelers**, *supra*, at 1552. The Court further concluded that perjury by a party does not meet that standard.

Judge Phillips, distinguishing the similar but separate doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion), held that these doctrines bar Graham II.

Graham did not appeal the February 21, 1991, Graham II Order and Judgment.

Graham III

On September 10, 1991, Graham filed, again through the efforts of Defendant Attorney Tweedy, in Tulsa County, Oklahoma, District Court yet another action (Graham III) against American,[2] CJ-91-4125. On September 27, 1991, American filed this action (Graham IV) seeking to enjoin Graham and Tweedy from proceeding in the state court action, which has been stayed, pending a ruling by this Court, by Order of the state District Judge.

In Graham III, Graham alleges that American and its agent and its employee, George Barton, Graham's supervisor, and Buck Williams, Graham's crew chief, and Graham's union, the TWU, and its

[2] George Barton, Buck Williams and Wayne Ping, Agent for United Transport Workers Union of America are also defendants in Graham III.

agent, Wayne Ping, committed fraud against Graham in Graham I and Graham II when American and the other Defendants "fraudulently represented" that Graham damaged the Ports of Call 4th stage turbine disk in 1985 and "fraudulently concealed" the fact that the disk had been overhauled in 1982 and not in 1985.

On January 13 and 15, 1992, this Court held evidentiary hearings on American's Motion for a Preliminary and Permanent Injunction. Through witnesses Dennis Quish and George Barton, American again established and proved that on June 7, 1985, Graham damaged the 4th stage turbine disk 9B6198 removed from an engine owned by Ports of Call, as found in Judge H. Dale Cook's Findings of Facts 30, 32 and 46 entered in Graham I.

This issue is the same issue Graham seeks to again litigate in the pending state court action, an impermissible effort. **Travelers**, *supra*. Relief from fraud must be made by direct attack in the same case in which the fraud was committed and a party cannot use an independent action for relief from judgment as a vehicle for the relitigation of issues. *Id.*

Graham has repeatedly raised in Graham I and Graham II allegations of fraud, altered or concealed evidence and perjury which is now asserted by Graham in Graham III. Judges Cook and Phillips considered and rejected these same claims and issues, now final, upon which Graham has predicated the pending state court action.

The terms *res judicata* (claim preclusion) and collateral estoppel (issue preclusion), are related but distinct doctrines. **Lujan v.**

United States Dept. of the Interior, 673 F.2d 1165 (10th Cir. 1982) *cert. den.* 459 U.S. 969, *rehearing denied* 459 U.S. 1229. Unless prevented by special circumstances, a plaintiff should raise all of the theories, state and federal, available to her or him in the same lawsuit. **Ruple v. City of Vermillion, S.D.**, 714 F.2d 860 (8th Cir. 1983) *cert. den.* 465 U.S. 1029. Failure to so do results in claim preclusion and bars relitigation. **Ruple**, *supra*.

Graham argues that the **Cromwell** principles[3] relating to the effect of judgments, as quoted in **In Re Four Seasons Securities Laws Litigation**, 370 F. Supp. 219 (W.D. Okl., 1974), controls the instant matter. The Court disagrees. The very language from **Four Seasons**, quoting **Cromwell**, set forth by Graham in her pleadings, militates against her cause, as follows:

> " . . . there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action."
>
> * * *
>
> " . . . where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." (emphasis added by Graham).

As stated, *infra*, Graham III presents the same claims and issues as decided in Graham I and Graham II, not different claims and

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[3] **Cromwell v. County of Sac**, 94 U.S. 351 (1876).

issues.

Graham further argues that the **Anti-Injunction Act**, 28 U.S.C. § 2283, prevents this Court from granting American the injunctive relief sought herein. That section provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

American counterpoints that the "relitigation" exception to the Anti-Injunction Act provides ample case precedent for the relief sought herein by American.

To begin with, § 2283 applies to restraints on private parties as well as those imposed directly on a state court. **Henry v. First Nat. Bank of Clarksdale**, 595 F.2d 291 (5th Cir.1979), *rehearing denied* 601 F.2d 586, *cert. den.* 444 U.S. 1074. In actual application, state/federal comity dictates that federal courts should, if warranted, enjoin the **parties** rather than the state court or judge where an injunction against the litigants will accomplish the same purpose. **Federal Home Loan Bank Bd. v. Court of Common Pleas**, 510 F.Supp. 40 (D.C.Ohio,1981).

The relitigation exception to § 2283 is appropriate and traditionally used in the case of baseless and vexatious state court proceedings. **Browning Debenture Holders' Committee v. DASA Corp.**, 454 F.Supp. 88, (D.C.N.Y.1978), affirmed 605 F.2d 35. However, in determining its applicability, the federal court's judgment is presumably far more threatened if the state proceeding,

as in the present case, involves the *same* issues rather than if it involves only issues that could have been, but were not raised. **Delta Air Lines, Inc. v. McCoy Restaurants, Inc.**, 708 F.2d 582 (5th Cir.1983).

The relitigation exception to the Anti-Injunction Act is applicable when the federal judgment is claim preclusive or issue preclusive, if the federal court, as in the matter *sub judice*, has actually decided the claims or issues which a federal injunction would insulate from state proceedings. **Nationwide Mut. Ins. Co. v. Burke**, 897 F.2d 734 (4th Cir. 1990). The central prerequisite for applying the relitigation exception to the Anti-Injunction Act is that claims or issues which the federal injunction insulates from litigation in state court proceedings actually have been decided by the federal court. **Chick Kam Choo v. Exxon Corp.**, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127, (1988). Such prerequisite is strict and narrow, requiring an assessment of the precise state of the record and of what the earlier federal order(s) actually said, and does not permit post hoc judgment as to what the order(s) intended to say. *Id.*

In this matter, the Court concludes the gravamen of Graham's pending state court proceeding is that the repair of, and therefore the damage to, the 4th stage turbine disk of the Ports of Call engine occurred in 1982 and could not have occurred in 1985 as found by Judge Cook in Graham I. This Court concludes, from the evidentiary hearings and the present pleadings, and also the pleadings of Graham I (including the record), Graham II and Graham

III, that this is the precise issue around which the various allegations of fraud, perjury and record forging are layered. The Court further concludes that Graham's claims and issues in Graham III are barred by the doctrines of *res judicata* and collateral estoppel from Graham I and II.

The Court concludes that Defendants Craig Tweedy and Lillian Graham should be and each are herewith enjoined from proceeding further in the state court proceeding styled **Lillian A. Graham v. American Airlines, Inc., George Barton, Buck Williams and Wayne Ping, Agent for United Transport Workers Union of America**, CJ-91-4125, D.C. Tulsa County, State of Oklahoma. These Defendants are further enjoined from instigating, against American and those parties in privy thereto to the claims and issues herein, any further action or proceeding, in either state or federal court or any court or administrative tribunal, on these same claims and/or issues. Any violation of the Court's injunction by either Defendant will subject the violator to appropriate sanctions.

The Court next considers American's request for the imposition of sanctions pursuant to 28 U.S.C. §1927 resulting from these Defendants' actions in bringing Graham III. The Court views the pending state court proceeding as essentially vexatious and baseless, the issues therein having been resolved against Graham in Graham I and Graham II. Part of the Court's view is shaped by the fact that Graham, while strongly protesting alleged wrongs committed against her at the hands of American and others, has never completed an appeal of the adverse decisions in either Graham

I and Graham II to the Tenth Circuit Court of Appeals.

Graham did file a Notice of Appeal in Graham I, opting to withdraw the appeal and pursue a Rule 60 motion to vacate the judgment in Graham I. In Graham II, Graham filed no Notice of Appeal. It occurs to the Court that a party litigant who alleges such deliberate maligning and intrigue being practiced upon her would surely sound out her grievances in a higher court, having achieved no satisfactory results at the District level. Further, it is obvious that Graham is not intimidated by the prospect of more litigation, which sometimes chills a litigant's appeal decision.

Three different District Judges, including the undersigned, have considered issues and claims in this ongoing repetitive saga. Despite the multiplicity of suits and judges the decision against Graham is essentially the same on the overall issue, i.e. that Graham was discharged from American for unsatisfactory job performance and not because of sexual discrimination. One lawsuit to pursue her alleged rights was appropriate. Two lawsuits are inappropriate. Three lawsuits are clearly vexatious.

The Court concludes sanctions pursuant to 28 U.S.C. §'1927, could not properly be imposed against Defendant Lillian Graham, a non-attorney. **Damiani v. Adams**, 657 F.Supp. 1409, (S.C.Cal 1987); **Chrysler Corp. v. Lakeshore Commercial Finance Corp.**, 389 F.Supp. 1216, (D.C.Wis.1975) affirmed 549 F.2d 804. However, sanctions may be imposed against counsel, where appropriate. The Court concludes Graham III was and is a baseless, unreasonable and vexatious proceeding which should not have been filed. The Court further

concludes that Defendant Craig Tweedy should be and he is required by the Court to satisfy personally the excess costs, expenses, and attorneys fees reasonably incurred in this action because of his conduct in initiating and prosecuting Graham III[4], which required American to seek injunctive relief in the present action.[5]

The parties shall adhere to the following schedule:

By April 10, 1992, Plaintiff shall filed its statement of excess costs, expenses and attorneys fees reasonably incurred herein.

By April 20, 1992, Defendant Attorney Tweedy shall file his response thereto.

A hearing on the excess costs, expenses and attorneys fees is set before Magistrate Judge Jeffrey Wolfe on April 28, 1992, at 9:30 a.m..

IT IS SO ORDERED this 31st day of March, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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[4] Any award of costs, fees or other expenses against Defendant Attorney Tweedy and/ Defendant Lillian Graham in the state court action, if appropriate, is a matter for consideration by the state court.

[5] The Court notes Defendant Attorney Tweedy has an historical penchant for vexatious relitigation for which he has been previously, personally sanctioned. See, **The Burggraf Corporation v. Goodyear Tire and Rubber, Inc.**, Northern District of Oklahoma, Case No. 82-C-1177-B, United States Court of Appeals for the Tenth Circuit Case No. 90-5091; **Sooner Products v. McBride**, Northern District of Oklahoma, Case No. 81-C-31-B, United States Court of Appeals for the Tenth Circuit Case No. 85-1033. See attached Orders and Judgments.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SOONER PRODUCTS COMPANY, an Oklahoma Corporation,

Plaintiff,

CRAIG TWEEDY and EARL W. WOLFE,

Appellants,

vs.

PAUL McBRIDE; R. DOW BONNELL; W. C. SELLERS; JAMES M. STURDIVANT; WILBUR L. DUNN; RICHARD D. PITTENGER; GEORGE L. BROWN; CITIZEN'S SECURITY BANK OF BIXBY, OKLAHOMA, a State Banking Corporation in Oklahoma; ARCH INVESTMENTS, INC., an Oklahoma Corporation; ARCH MANUFACTURING COMPANY, an Oklahoma Corporation; PITTENGER SINTERED PRODUCTS, INC., an Oklahoma Corporation; and LENCO, INC., a Missouri Corporation;

Defendants-Appellees.

No. 85-1033
(D.C. No. 81-C-31-B)
(N.D. Oklahoma)

ORDER AND JUDGMENT

Before HOLLOWAY, Chief Judge, MOORE and TACHA, Circuit Judges.

Pursuant to our prior order reserving jurisdiction, we have before us an appeal of the award of attorneys' fees and costs which we had remanded for determination to the United States District Court for the Northern District of Oklahoma. The district court was directed to entertain all motions in this matter in the light of Broadway [sic] Express, Inc. v. Piper, 447

U.S. 752, 767-768 (1980), which sets forth the standard based on Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978), that fees and costs may be awarded to prevailing defendants upon a finding that plaintiff's action was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." After an evidentiary hearing and the submission of supporting briefs and affidavits, the district court awarded $6,847.56 in attorneys' fees and costs divided among the petitioning attorneys for the costs of the appeal.[1] The court found that under 28 U.S.C. § 1986 [sic] and Fed. R. Civ. P. 11, the actions of attorneys Craig Tweedy and Earl Wolfe (appellants), who represented Sooner Products Company (Sooner), a now defunct Oklahoma corporation, were vexatious and unreasonable, needlessly multiplying the proceedings and incurring excess costs. Appellants challenge the award by reasserting the facts of their initially dismissed case to demonstrate that the action was neither frivolously nor unreasonably instituted. We disagree, and, while we affirm the district court's result, we must clarify its foundation.

When we substitute the correct citations for those in the district court's order, we conclude that $6,847.56 was assessed

[1] Sooner had appealed the denial of its motion to amend its complaint a second time. We held the appeal was untimely, and the district court did not abuse its discretion in refusing Sooner leave to file a second amended complaint. Sooner Products Co. v. McBride, 708 F.2d 510 (10th Cir. 1983). Upon our affirming the dismissal of Sooner's § 1983 action, we reserved jurisdiction and remanded for consideration of an award of costs and attorneys' fees.

purely as a sanction against appellants under 28 U.S.C. § 1927 and Fed. R. Civ. P. 11. Section 1927 provides:

> Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Fed. R. Civ. P. 11 provides in part:

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it . . . an appropriate sanction . . . including a reasonable attorney's fee.

Restricting its inquiry to the recovery of costs and attorneys' fees for the proceedings before this court,[2] the district court reviewed the background of the action. The court found that appellants twice sought to amend the complaint seeking redress under 42 U.S.C. §§ 1983, 1985, and 1986 when the complaint was devoid of any factual allegations to support such claims. When the complaint was dismissed, appellants untimely appealed the dismissal, justifying their untimeliness with the contention that the dismissal of an action is not a final appealable order. Appellants' complaint alleged that the patent rights at issue were worth $100 million, albeit an option to buy those rights was sold for $40,000. Appellants filed in the federal court to relitigate issues that were already decided against them in several state

[2]The district court held that under Local Rule 6(e) and (f), the parties are required to file motions for costs and attorneys' fees within 10 days of the final decree or judgment. Since the defendants' motions were untimely, recovery was precluded for costs and fees for proceedings before the trial court.

court actions. Although appellants sought to shelter their claims under the umbrella of the Civil Rights Act, it was never raining.

Defendants, thus, were never "prevailing parties" as defined in Christianburg Garment Company, 434 U.S. at 423. The district court never applied this standard. The court, however, concluded appellants' conduct was sufficiently vexatious and unreasonable as to multiply the proceedings unnecessarily. Although 28 U.S.C. § 1927 has been amended since the Court's decision in Roadway Express, its holding that § 1927 cannot be read into 42 U.S.C. § 1988 has not changed. The Court in Roadway noted:

> The fee provisions of the civil rights laws are acutely sensitive to the merits of an action and to antidiscrimination policy. Unlike § 1927, both § 1988 and § 2000e-5(k) restrict recovery to prevailing parties . . . . But § 1927 does not distinguish between winners and losers, or between plaintiffs and defendants. . . . It is concerned only with limiting the abuse of court processes.

Id. at 762. We adhere to this analysis. Section 1927 now permits the award of attorneys' fees directly against an attorney, but we cannot inject its remedy into § 1988 without lapsing into "standardless judicial lawmaking" unintended by Congress. Id. at 763.

In affirming the district court, we are aware that courts imposing sanctions on an attorney under § 1927 must afford the attorney "all appropriate protections of due process under the law." H.R. Rep. No. 96-1234, 96th Cong., 2d Sess. 8, reprinted in 1980 U.S. Code Cong. & Ad. News 2782, 2783. Appellants were afforded notice and the opportunity for an evidentiary hearing in which they fully participated before the court reached its

determination of whether the fees should be awarded. Glass v. Pfeffer, 657 F.2d 252, 258 (10th Cir. 1981).

Accordingly, we affirm the award of attorneys' fees and costs assessed individually against appellants as a sanction for their abuse of the judicial process.

ROBERT L. HOECKER, Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

THE BURGGRAF CORPORATION, an Oklahoma corporation; DISCOUNT TIRES OF OKLAHOMA, INC., an Oklahoma corporation, by and through LOLA BURGGRAF, JERRY BURGGRAF, AND LARRY BURGGRAF, shareholders; LOLA BURGGRAF, JERRY BURGGRAF, and LARRY BURGGRAF, individually,

Plaintiffs-Appellants,

v.

GOODYEAR TIRE AND RUBBER, INC., a corporation; LEE TIRE & RUBBER CO., a corporation; KELLY-SPRINGFIELD COMPANY, a corporation; CLARENCE E. BURGGRAF, SR.; SHIRLEY BURGGRAF; L. K. NEWELL; and GEORGE UTTERBACK,

Defendants-Appellees.

No. 90-5091
(D.C. No. 82-C-1177-B)
(N.D. Okla.)

ORDER AND JUDGMENT*

Opal A. Carter

Before MCKAY, MOORE, and BRORBY, Circuit Judges.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

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cause is therefore ordered submitted without oral argument.

Appellants (Plaintiffs) appeal the denial by the district court of their motion to vacate the district court's discovery orders, order granting partial summary judgment and order dismissing the balance of the action with prejudice. We affirm the actions of the district court and grant Appellees' (Defendants) motion for sanctions.

Procedural History

This case has a long and tortuous history. The original complaint, which was filed in December 1982, was commenced as a stockholders derivative suit. It set forth three basic claims for relief: (1) violations of the Robinson-Patman Act; (2) common law claims of fraud; and (3) common law claims of breach of fiduciary duty.

One year later, the case being set for jury trial, the district court ordered a discovery conference following Plaintiffs' motion for continuance. The district court continued the trial until April 1984 based upon Plaintiffs' representations that the case would be ready for trial in April or the case would be dismissed. The trial court then ordered Plaintiffs to respond to Defendants' discovery requests by furnishing "all alleged instances of contemporaneous sales of products which violate the Robinson-Patman Act." In February 1984, Plaintiffs filed a motion asking for a delay in discovery and an additional continuance of

the trial and Defendants requested the case be dismissed due to Plaintiffs' failure to comply with the discovery conference order. The district court granted the Plaintiffs additional time to comply with discovery and left the trial setting intact. In March 1984, the trial court granted partial summary judgment. At this time Plaintiffs appealed to this court, requesting mandamus and alleging abuses of discretion by the trial court in the scheduling of discovery and trial and in the granting of partial summary judgment. This court denied the requested relief in Appeal No. 84-1877, holding, in essence, that the appeal was premature.

Following this appeal, the trial court called the case for trial; Plaintiffs then announced they did not wish to proceed to trial, and the trial court dismissed the action with prejudice for failure to prosecute, under Fed. R. Civ. P. 41(b). Plaintiffs appealed this decision to this court where we affirmed the dismissal in Appeal No. 84-1991. We specifically affirmed the action of the district court in dismissing Plaintiffs' complaint with prejudice. Following this decision we denied rehearing and remanded the case to the trial court for a determination of sanctions against Plaintiffs' counsel. This action was followed by an unsuccessful petition for rehearing en banc and by a petition for certiorari that was denied. Upon remand and following an evidentiary hearing, the district court granted sanctions against Plaintiffs' counsel. Upon appeal we affirmed the action of the trial court in granting sanctions holding the conduct of counsel warranted such action. This order was entered

in October 1987 in Appeal No. 86-2462.

It should be noted that throughout these proceedings Plaintiffs argued that fraud and deception were perpetrated on the district court and upon this court. See No. 86-2462. Despite Plaintiffs' rambling and repetitious assertions in sixty-four pages of briefs, no such fraud or deception has been made evident to this court.

In June 1989, Plaintiffs filed with the trial court a motion to vacate. In this document Plaintiffs demanded that the trial court vacate all of its orders issued on and after December 2, 1983. Specifically, this would have included the order requiring Plaintiffs to respond to discovery, the order granting partial summary judgment, and the order of dismissal with prejudice. Plaintiffs assert these orders to be null and void as being induced by the Defendants' successful scheme of fraud upon the court. Plaintiffs argue that the discovery request granted by the trial court was an "unauthorized attempt to amend the Complaint," which showed bias. Plaintiffs contend that Defendants and their counsel deceptively permitted the trial court to amend the complaint by granting the discovery request. Plaintiffs also contend this "scheme displayed a cunning exercise of [Defendants'] sophisticated understanding of the law ... to subvert and defile the impartial processes of this Court ...." The argument advanced in this motion is unique. Plaintiffs argue that the Federal Rules of Civil Procedure contemplate notice pleading. Thus when

Defendants filed discovery requests seeking evidentiary information, the court had no authority to order Plaintiffs to produce that information as doing so violated the concept of notice pleading and therefore Plaintiffs' complaint was improperly "amended."

The district court denied Plaintiffs' motion, saying in part:

> Plaintiff asserts this Court's Order dismissing the case was void for lack of subject matter jurisdiction. The genesis of Plaintiff's argument is this Court lacked the authority to require Plaintiffs to provide detail facts regarding contemporaneous sales of products which violated the Robinson-Patman Act because the Federal Rules of Civil Procedure prohibit pleadings of detailed evidentiary facts. Plaintiff theorizes that because the Court did not have the authority to require such specified pleadings, all subsequent Orders were void.
>
> The language from the December 5, 1983 Order states: "(2) Plaintiffs are to provide defendants with all alleged instances of contemporaneous sales of products which violate the Robinson-Patman Act by January 23, 1984." It is evident that Plaintiff confuses Rule 8 notice pleading with a Court's inherent authority to govern and limit discovery pursuant to Rule 26. As this Court determines it had both the authority to limit discovery and subject matter jurisdiction in which to dismiss the case pursuant to Rule 41(b), Plaintiff's Motion to Vacate is DENIED.

Order, dated March 19, 1990.

Plaintiffs now appeal this decision of the district court. In their brief, Plaintiffs raise three issues, which we quote verbatim:

> 1) Whether an unconscionable scheme of fraud induced plain usurpations of power operating to dismiss the Robinson-Patman case and claims and oust Article III jurisdiction and subvert the Plaintiff's due process and appeal rights, masked by judicial fiats substituting void and moot detail sales fact allegations provided by Defendants for the void Rule 41(b) dismissal and

fraudulent appearance of the Plaintiffs' failure to prosecute "their" uneconomic claims, the fraud scheme perpetuated upon this Court.

2) Whether the Trial Court erred and showed bias and clear abuses of discretion and duty by failing to vacate the wholly void decisions and plain usurpations of power induced by the Defendants' unconscionable scheme of fraud?

3) Whether, because of the unconscionable scheme of fraud designed to improperly influence and subvert judicial decisions operated to indirectly contravene and violate the Federal Rules and Clayton Act and the Plaintiffs' case and appeal rights and due process protections, the Defendants may present any opposition to this appeal without perpetuating their former, essential and underlying scheme of fraud upon this Court?

Plaintiffs' arguments do not merit substantial discussion. All of the matters raised by Plaintiffs in this appeal either were raised or should have been raised following the trial court's final order of July 3, 1984, dismissing the entire action with prejudice. Following the trial court's dismissal of the action the litigation was ended and left nothing further for the trial court to do except execute judgment. This is the classic definition of a final order.

Plaintiffs in this case are now seeking a second and prohibited bite of the apple by claiming the trial court lacked jurisdiction to enter the orders that Plaintiffs have already appealed without success. The basis of Plaintiffs' jurisdiction claim--that the Rules of Civil Procedure do not require the complaint to set forth a detailed statement of the facts, and therefore, the court does not have jurisdiction to require

Plaintiffs to set forth the evidence when discovery is requested--is patently frivolous.

This court has endured Plaintiffs' Reply Brief, filed seventy-three days beyond the deadline established by court rules. See Fed. R. App. P. 31(a) and 10th Cir. R. 31.2.1. Despite that passage of time, Plaintiffs' Reply Brief is in all respects as frivolous and as poorly taken as is their Brief-in-Chief. Plaintiffs persist in their refusal to recognize the distinction between adequate notice pleading and subsequent, deficient compliance with valid discovery orders. (See District Court Order dated March 19, 1990, quoted supra, p. 5.) Their attempt to relitigate the validity of those orders before this court is unavailing.

Plaintiffs' request for attorney's fees, and the imposition of sanctions against Defendants is totally unsupported by the record, and frivolous and therefore denied.

We now turn our attention to Defendants' motion for sanctions. We note that Plaintiffs have failed to precede the discussion of each issue with a statement of this Court's applicable standard of review. See 10th Cir. R. 28.2(c). Plaintiffs' attempted restatement of the standard of review is wholly inaccurate and mistaken:

> The records facts and case authorities in support of the issues present the appeal standard of whether the Trial Court's decision of March 19, 1990 is wrong and erroneous, as a matter of law, and/or shows a clear

> abuse of discretion and/or showed the failure of affirmative duty to vacate the underlying and challenged decisions as being null and void, even before being so declared by the Courts.

The correct standard of review is found in the case law. In reviewing the district court's determination that its underlying orders are not void for lack of subject matter jurisdiction, this court reviews de novo. King Fisher Marine Service, Inc. v. 21st Phoenix Corp., 893 F.2d 1155, 1158 (10th Cir. 1990), cert. denied, 110 S. Ct. 2603 (1990). We review the district court's ruling on a Rule 60(b) motion to vacate under an abuse of discretion standard. Republic Resources Corp. v. ISI Petroleum West Caddo Drilling Program 1981, 836 F.2d 462, 465 (10th Cir. 1987).

We note that Plaintiffs have cited no authority whatsoever to support their theory that Plaintiffs have no obligation to answer discovery requests because a complaint need not set forth the facts in detail. We next note that Plaintiffs have cited no authority concerning their second and third propositions. We also note that Plaintiffs have misrepresented to this court certain case holdings or, at the least, have not stated the entire holding of such cases. See Conley v. Gibson, 355 U.S. 41, 47-48 (1957) ("simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues" (footnote omitted); New Home Appliance Center, Inc. v. Thompson, 250 F.2d 881, 883-84 (10th Cir. 1957) ("Particularization of the issues is indeed the first order of

business.... They are to be ascertained and articulated by the free use of controlled pre-trial discovery under the guiding hand of the judge"); Nagler v. Admiral Corp., 248 F.2d 319, 326 (2d Cir. 1957). Plaintiffs misrepresented the holding of J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981), by quoting passages, which the J. Truett Payne Court distinguished and declined to follow, and offering them as that case's holding. Such selective and misleading citation to precedent is intolerable. Plaintiffs have also failed to cite controlling authority. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986), which requires the nonmoving party to go beyond the pleadings and designate specific facts showing there to be a genuine issue for trial. We mention these defects, not as a comprehensive listing, but only as being illustrative of the nature of Plaintiffs' arguments and brief to this court.

The appeal in the instant case is frivolous in every respect. This is the sixth appeal concerning this case and the second that has been found to be frivolous. It is apparent to this court that Plaintiffs' actions in filing six appeals and making patently frivolous appeals establishes a pattern that cannot be tolerated. It is likewise obvious that Defendants have been put to unnecessary costs, fees and expenses as a result of this appeal. It is therefore ordered that this matter is remanded to the district court for the sole purpose of determining the amount of sanctions to be imposed for the prosecution of this frivolous appeal and determining who should pay the sanctions, i.e., counsel

for Plaintiffs, or Plaintiffs, or both.

The judgment and the actions of the district court are therefore **AFFIRMED** and this matter is **REMANDED** to the district court for the purpose of determining the amount of sanctions, including attorney fees and costs, and the liability therefor.

Entered for the Court:

WADE BRORBY
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE BURGGRAF CORPORATION, et al.,)
)
Plaintiffs,)
)
vs.) No. 82-C-1177-B
)
THE GOODYEAR TIRE & RUBBER COMPANY,)
et al,)
)
Defendants.)

ORDER

Currently before the Court is Plaintiff's Motion to Vacate this Court's Orders dated December 2, 1983, January 23, 1984, February 28, 1984, April 18, 1984, June 25, 1984, July 5, 1984 and July 17, 1986 pursuant to Fed.R.Civ.P. 12(h)(3) and 60(b).

Plaintiff asserts this Court's Order dismissing the case was void for lack of subject matter jurisdiction. The genesis of Plaintiff's argument is this Court lacked the authority to require Plaintiffs to provide detail facts regarding contemporaneous sales of products which violated the Robinson-Patman Act because the Federal Rules of Civil Procedure prohibit pleadings of detailed evidentiary facts. Plaintiff theorizes that because the Court did not have the authority to require such specified pleadings, all subsequent Orders were void.

The language from the December 5, 1983 Order states: "(2) Plaintiffs are to provide defendants with all alleged instances of contemporaneous sales of products which violate the Robinson-Patman Act by January 23, 1984." It is evident that Plaintiff confuses

Rule 8 notice pleading with a Court's inherent authority to govern and limit discovery pursuant to Rule 26. As this Court determines it had both the authority to limit discovery and subject matter jurisdiction in which to dismiss the case pursuant to Rule 41(b), Plaintiff's Motion to Vacate is DENIED.[1]

IT IS SO ORDERED, this 14th day of March, 1990.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[1]Defendants have moved for sanctions to be imposed under Rule 11 against Plaintiff's counsel, Craig Tweedy. At this time, the Court does not think imposing sanctions would be appropriate; however, Defendants are free to re-urge the motion if Plaintiff's counsel pursues the Motion to Vacate.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAR 30 1992

GARY BEWLEY,

Plaintiff,

v.

BRUCE HOWELL, Superintendent; INDEPENDENT SCHOOL DISTRICT NO.1 OF TULSA COUNTY, OKLAHOMA; BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO.1 OF TULSA COUNTY, OKLAHOMA; JIMMY REEDER; DOUG DODD; JIM PAYNE; VERNON HOBBS; JUDY McINTYRE; WALTER HUSHBECK; individually and as members of the Board of Education of Independent School District No.1 of Tulsa County, Oklahoma; and CATHY RODGERS, an individual;

Defendants.

91-C-346-B

ORDER

Before the Court is the Joint Motion of the School District Defendants and Cathy Rodgers to Dismiss Defendant Cathy Rodgers, or in the Alternative for Separate Trials (Docket #20)[1].

The School District Defendants and Cathy Rodgers ("Rodgers") ask the court to dismiss Rodgers from this action for lack of subject matter jurisdiction. The Defendants point out that Gary Bewley's ("Bewley") complaint alleges a number of causes of action against the School District Defendants, including deprivation of liberty and property without due process, violation of the Age Discrimination in Employment Act, and various state law claims, including breach of contract and violation of the Oklahoma Open

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

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Meeting Act. The causes of action in large part challenge the fairness of the pre-termination procedures accorded Bewley and the motivation of the Board of Education in terminating him from his administrative position at Will Rogers High School in Tulsa, Oklahoma on June 20, 1990. The cause of action asserted against Cathy Rodgers is a state law defamation cause of action based on Rodgers' allegations of sexual improprieties against Bewley relating to his conduct on May 3, 1988.

The Defendants contend that the state law defamation cause of action against Rodgers is not part of the same case or controversy that Bewley has pled against the School District Defendants and does not fall within the court's supplemental jurisdiction under 28 U.S.C. § 1367. The Defendants ask that, even if supplemental jurisdiction is found as to the claim against Rodgers, the court decline to exercise supplemental jurisdiction to avoid jury confusion and prejudice to the Defendants. Defendants note that there is no federal question jurisdiction for Bewley's claim against Rodgers, as there is of his claims against the other Defendants, and there is no diversity jurisdiction present, as both Bewley and Rodgers are residents of Tulsa County, Oklahoma.

Congress codified the doctrines of pendent and ancillary jurisdiction developed in earlier case law as the concept of "supplemental jurisdiction" in Title 28 of the United States Code, § 1367. This statute expanded the federal court's jurisdiction to hear claims that are ancillary or pendent to federal claims, but the jurisdiction has limits. Under § 1367(a), the court has

supplemental jurisdiction in any civil action of which it has original jurisdiction and "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." The "same case or controversy" language was derived from the Supreme Court's analysis of pendent jurisdiction in United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

Defendants allege that the claim against Rodgers and the claims against the School District Defendants are two distinct "cases". The defamation claim puts at issue the truth of the statements made by Rodgers about Bewley's conduct on May 3, 1988. This cause of action will compel the jury to weigh the evidence and credibility of Bewley and Rodgers and determine who is telling the truth. The allegations in Bewley's causes of action against the School District Defendants, on the other hand, challenge the fairness of the procedures accorded Bewley when he was terminated from his employment. Bewley alleges that his due process rights were violated because he was deprived of a fair and impartial hearing after being previously exonerated of any allegations of wrongdoing.

Bewley also contends that the School District Defendants violated the Oklahoma Open Meeting Act by not recording minutes of its executive session deliberations and that they held him to an improper burden of proof at the hearing. Defendants claim that these procedural issues do not bring into dispute the truth or

falsity of Rodgers' statements about Bewley. They argue that Bewley may not re-litigate the truth of Rodgers' testimony before the Board of Education. They claim that Bewley's contention that the School District Defendants were motivated by his "whistle blowing" on alleged illegal activities by his superiors at the Tulsa School District and by his age and accompanying benefits are not part of the same case or controversy as the claim against Rodgers.

The Defendants ask that, if the court concludes the claims are all part of one case, it decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c), which provides:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if --
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Defendants contend that the jury will be confused if the issues and evidence presented regarding the defamation claim, which are different from the issues and evidence to be presented regarding the claims against the School District Defendants, are presented in one trial. In litigating the defamation claim, Bewley and Rodgers will be entitled to go beyond the evidence presented to the Board of Education on June 20, 1990. The issues and evidence

to be presented regarding the allegations against the School District Defendants will be much more limited. The jury may not retry the issues that the Board considered at Bewley's pre-termination hearing, but will decide whether Bewley received a fair opportunity to present his side of the story and if there were evidence supporting the Board's decision. Defendants claim that injecting an inquiry about the truthfulness of Rodgers' statement that Bewley seduced her and had sexual intercourse with her will confuse and distort the inquiry.

Defendants claim the issue of whether Bewley received a fair hearing will be changed into an opportunity for second guessing and, in fact, retrying the decision of the Board of Education with additional evidence not submitted to the Board. The same witnesses will be utilized for different testimony. Rodgers will ask these witnesses about the events of May 3, 1988, based on both their current knowledge and what they knew at that time. The School District Defendants will ask these witnesses only what they told the Board at Bewley's pre-termination hearing. Defendants claim it will be impossible for the jury to make the fine distinctions required by these two lines of inquiry. The Defendants ask the court to dismiss the claim against Rodgers or order a separate trial of that claim under Rule 42(b) of the Federal Rules of Civil Procedure to prevent prejudice to Defendants and confusion to the jury.

Plaintiff contends that his claims against the School District Defendants involve the truthfulness of Rodgers' accusations. He

claims that to prove his liberty interest claim, which centers on whether stigmatizing statements were published about him that foreclosed his opportunity to find comparable employment, he will have to show that Rodgers' statement was false. Once a liberty interest is found to have been deprived, the court will examine whether due process was provided in the deprivation.

Plaintiff also contends that he will have to prove his first amendment "whistle-blowing" claim and age discrimination claim by showing that he was terminated and the reason given for the termination by Defendants is a pretext. The District's articulated reason for the termination was Bewley's alleged sex with Rodgers. Bewley contends he will have to show the pretext of this allegation by either proving that a discriminatory reason more likely than not motivated Defendants or by showing that Defendants' proffered explanation is not believable. By proving the allegations false, Bewley argues that he will establish that the proffered explanation is not credible. Additionally, Bewley claims that the falsity of Rodgers' allegations are part of his contention that there was not good cause for his termination, and his one-year written contract with the Tulsa Public School District was breached.

The Defendants respond by arguing that the trial court should only properly review the procedures involved in the termination, not re-weigh the evidence presented at the hearing, to rule on Bewley's due process claim. They argue that proof of pretext regarding the first amendment and age discrimination claims depends on whether the school Board was motivated by Rodgers' testimony,

not on whether her testimony was truthful. They also respond that the truthfulness of Rodgers' testimony is irrelevant to Bewley's breach of contract claim, because the Board's action of termination was final and it had the right to dismiss him, whether he contested the termination or not.

The Court finds that the defamation claim against Rodgers arises from the "same case or controversy" as that from which the plaintiff's claims against the School District Defendants originate. To find that the truth of Rodgers' allegation is a separate controversy from the effect of the allegation draws too fine a line when, as here, the allegation purportedly precipitated the plaintiffs' deficient hearing and wrongful termination. The Court, therefore, concludes that it has supplemental jurisdiction over plaintiff's defamation claim under 28 U.S.C. §1367(a).

The Court, however, declines to exercise its supplemental jurisdiction, pursuant to 28 U.S.C. §1367(c)(2) and (4). "It has consistently been recognized that [supplemental] jurisdiction is a doctrine of discretion, not of plaintiff's right." United Mine Workers of America v. Gibbs, 383 U.S. 715, 727 (1966). The Court concludes that Bewley's defamation claim against Rodgers substantially predominates over his claims against the School District Defendants, and its inclusion would inevitably focus the inquiry at trial on the truth of Rodgers' allegation, rather than the adequacy of the hearing and the reasonableness of the School Board's actions in terminating Bewley's employment. The Court has serious doubts that it can effectively instruct the jury to

consider the truth of Rodgers' allegation in regard to the defamation claim, but not in relation to plaintiff's claims against the School Board. A more plausible paradigm of jury deliberation is that the jury's view of the plaintiff's claims against the School Board would be cast in light of its verdict concerning plaintiff's defamation claim against Cathy Rodgers. While the Court concedes that this result could still occur because much of the same evidence will be presented with or without the defamation claim, the Court concludes that its inclusion would unfairly prejudice the defendants. For these reasons, the Court declines to exercise its supplemental jurisdiction over plaintiff's defamation claim against the defendant Cathy Rodgers.

The Court, therefore, SUSTAINS defendants' Motion to Dismiss Defendant Cathy Rodgers without prejudice to same being timely commenced in the state court.

IT IS SO ORDERED, this 30th day of March, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA
Plaintiff(s),

vs.

No. 91-C-173-C

VERNON MONDAY
Defendant(s).

ORDER

Rule 35A of the Rules of the United States District Court for the Northern District of Oklahoma provides as follows:

> **A. In any case in which no action has been taken by the parties for six (6) months, it shall be the duty of the Clerk to mail notice thereof to counsel of record or to the parties, if their post office addresses are known. If such notice has been given and no action has been taken in the case within thirty (30) days of the date of the notice, an order of dismissal may, in the Court's discretion, be entered.**

In the action herein, notice pursuant to Rule 35A was mailed to counsel of record or to the parties, at their last address of record with the Court, on February 14, 1992. No action has been taken in the case within thirty (30) days of the date of the notice.

THEREFORE, it is the Order of the Court that this action is in all respects dismissed.

Dated this 30th day of March, 1992.

(Signed) H. Dale Cook

United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. KEITH N. WILEY, JR. a/k/a KEITH NELSON WILEY, JR.; BOBBIE S. WILEY a/k/a BOBBIE SUE WILEY; COUNTY TREASURER, Creek County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 91-C-380-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 30 day of March, 1992. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney; the Defendants, County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma, appear by Wesley R. Thompson, Assistant District Attorney, Creek County, Oklahoma; and the Defendants, Keith N. Wiley, Jr. a/k/a Keith Nelson Wiley, Jr. and Bobbie S. Wiley a/k/a Bobbie Sue Wiley, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, Keith N. Wiley, Jr. a/k/a Keith Nelson Wiley, Jr. and Bobbie S. Wiley a/k/a Bobbie Sue Wiley, were served with Summons and Complaint on December 9, 1991; that Defendant, County Treasurer, Creek County, Oklahoma, acknowledged receipt of Summons and Complaint on June 10, 1991;

and that Defendant, Board of County Commissioners, Creek County, Oklahoma, acknowledged receipt of Summons and Complaint on June 12, 1991.

It appears that the Defendants, County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma, filed their Answer on June 17, 1991; that the Defendants, Keith N. Wiley, Jr. a/k/a Keith Nelson Wiley, Jr. and Bobbie S. Wiley a/k/a Bobbie Sue Wiley, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on September 8, 1989, Keith Nelson Wiley, Jr. and Bobbie Sue Wiley p/k/a Bobbie Sue James filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 89-02679-C. On December 29, 1989, a Discharge of Debtor was entered in this bankruptcy case releasing the debtors from all dischargeable debts. On February 8, 1990, Bankruptcy Case No. 89-02679-C was closed.

The Court further finds that this is a suit based upon a certain promissory note and for foreclosure of a mortgage securing said promissory note upon the following described real property located in Creek County, Oklahoma, within the Northern Judicial District of Oklahoma:

> The South 2 feet of Lot 3, and all of Lot 4, Block 5, QUAIL VIEW WEST ADDITION to the City of Bristow, in Creek County, State of Oklahoma, according to the Recorded Plat thereof.
> Subject, however, to all outstanding easements, rights-of-way, mineral leases, mineral reservations, and mineral conveyances of record.

The Court further finds that on March 8, 1988, Keith N. Wiley, Jr. and Bobbie S. Wiley executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of $37,000.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Keith N. Wiley, Jr. and Bobbie S. Wiley executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated March 8, 1988, covering the above-described property. Said mortgage was recorded on March 10, 1988, in Book 232, Page 1584, in the records of Creek County, Oklahoma.

The Court further finds that on March 8, 1988, Keith N. Wiley, Jr. and Bobbie S. Wiley executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that the Defendants, Keith N. Wiley, Jr. a/k/a Keith Nelson Wiley, Jr. and Bobbie S. Wiley a/k/a Bobbie Sue Wiley, made default under the terms of the aforesaid note, mortgage, and interest credit agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the

Defendants, Keith N. Wiley, Jr. a/k/a Keith Nelson Wiley, Jr. and Bobbie S. Wiley a/k/a Bobbie Sue Wiley, are indebted to the Plaintiff in the principal sum of $38,068.14, plus accrued interest in the amount of $9,095.21 as of November 26, 1990, plus interest accruing thereafter at the rate of 9.5 percent per annum or $9.9081 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreement of $486.00, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of $59.20 ($20.00 docket fees, $31.20 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Creek County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $318.93, plus penalties and interest, for the year 1990. Said lien is superior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against Defendants, Keith N. Wiley, Jr. a/k/a Keith Nelson Wiley, Jr. and Bobbie S. Wiley a/k/a Bobbie Sue Wiley, in the principal sum of $38,068.14, plus accrued interest in the amount of $9,095.21 as of November 26, 1990, plus interest accruing thereafter at the rate

of 9.5 percent per annum or $9.9081 per day until judgment, plus interest thereafter at the current legal rate of 4.58 percent per annum until fully paid, and the further sum due and owing under the interest credit agreement of $486.00, plus interest on that sum at the current legal rate of 4.58 percent per annum from judgment until paid, plus the costs of this action in the amount of $59.20 ($20.00 docket fees, $31.20 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Creek County, Oklahoma, have and recover judgment in the amount of $318.93, plus penalties and interest, for ad valorem taxes for the year 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Keith N. Wiley, Jr. a/k/a Keith Nelson Wiley, Jr. and Bobbie S. Wiley a/k/a Bobbie Sue Wiley, to satisfy the judgment in rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without

appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendants, County Treasurer and Board of County Commissioners, Creek County, Oklahoma, in the amount of $318.93, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any

right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

WESLEY R. THOMPSON, OBA #8993
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Creek County, Oklahoma

Judgment of Foreclosure
Civil Action No. 91-C-380-B

KBA/css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PHILLIP A. WRIGHT, Personal Representative of the Estate of Helen Wright,

Plaintiff,

vs.

SPALDING & EVENFLO COMPANIES, INC., d/b/a EVENFLO JUVENILE FURNITURE COMPANY, a/k/a QUESTOR JUVENILE FURNITURE COMPANY; EVENFLO JUVENILE FURNITURE COMPANY; and QUESTOR JUVENILE FURNITURE COMPANY,

Defendants.

No. Case No. 91-C-442-B

O R D E R

Before the Court for decision is Defendants' appeal from the Magistrate Judge's Discovery Order of March 17, 1992, imposing sanctions relative to Defendants' violations of the Magistrate Judge's Discovery Memorandum Order of January 30, 1992.

The Magistrate Judge's Memorandum Order of January 30, 1992, at page 7 states:

> "Materials directed to be produced under this order are to be produced on or before February 10, 1992 unless for reason of deposition scheduling the parties can agree to produce documents at the time of deposition in Piqua, Ohio. Further the parties are to advise the court by that time of any present difficulties in discovery so that a discovery conference per Rule 26(f), Fed.R.Civ.P. may be scheduled if appropriate."

The discovery proceeded by agreement of the parties and without significant objection as provided in attorney Eldridge's letter to attorney Roach of February 10, 1992. Since such voluminous (approximately 5,000 documents) discovery was involved

it was appropriate for counsel to work together as they did to complete discovery. If attorney Roach could not concur in the procedure of attorney Eldridge's February 10, 1992 letter (apparently concurred in by telephone), he should have advised accordingly so attorney Eldridge could attempt to seek relief from the Magistrate Judge, if necessary.

Eldridge was lulled into a sense of security when no objection was raised to his February 10, 1992 letter. It appears, considering the large volume of documents, Defendants and Defendants' counsel were making reasonable effort to comply with the discovery requests, and had done so prior to the proposed deposition date in Ohio. Thus, any sanctions imposed, other than the reimbursement for the nonrefundable Ohio air fare ticket, are hereby set aside as an abuse of discretion. The Ohio deposition should be rescheduled at Defendants' offices in a suitable room.

DATED this 30th day of March, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JULIE A. GIBSON,

Plaintiff,

v.

ALLIANCEWALL CORPORATION,

Defendant.

Case No. 91-C-158-B

ORDER OF DISMISSAL WITH PREJUDICE

This matter came on before the Court this 27th day of March, 1992, upon the parties' Stipulation of Dismissal with Prejudice. For good cause shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Complaint against Defendant AllianceWall Corporation is hereby dismissed with prejudice with each party to bear its own costs and attorney fees.

[illegible]

U. S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION in its corporate capacity as holder of assets of the failed UTICA NATIONAL BANK & TRUST CO.,

Plaintiff,

v.

CHRISTOPHER DESIGN HOMES, INC., an Oklahoma corporation; MARK EN, LIMITED, an Oklahoma corporation; PAM STRONKS, AKA PAMELA STRONKS; LIBERTY NATIONAL BANK AND TRUST COMPANY OF OKLAHOMA CITY, a national banking association; G. E. DUPLEXES, INCORPORATED, an Oklahoma corporation; HOPE LUMBER AND SUPPLY COMPANY, an Oklahoma corporation; R & W CONTRACTORS, INC., an Oklahoma corporation; MARK C. ENTERLINE; BOARD OF COUNTY COMMISSIONERS OF TULSA COUNTY, OKLAHOMA; and JOHN F. CANTRELL, County Treasurer of Tulsa County, Oklahoma,

Defendants,

and

DAVID C. ROBERSON AND LINN A. ROBERSON, husband and wife,

Additional Defendants,

and

E.E.G. CORPORATION, an Oklahoma corporation,

Additional Defendant.

FILED

Case No. 90-C-572-B

DEFICIENCY JUDGMENT

NOW on this 27 day of March, 1992, this matter comes on for consideration before this Court, the Plaintiff, the Federal Deposit Insurance Corporation in its corporate capacity as holder of assets of the failed Utica National Bank & Trust Co. ("FDIC"), appears through its attorneys of record, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., by Jeffrey R. Schoborg; Defendants Christopher Design Homes, Inc., an Oklahoma corporation ("Christopher"); Mark En, Limited, an Oklahoma corporation ("Mark En"); G.E. Duplexes, Incorporated, an Oklahoma corporation ("GED"); and Mark C. Enterline ("Enterline") appear by and through their counsel of record, Albright & Gilsinger, by Dale J. Gilsinger; Defendant E.E.G. Corporation, an Oklahoma corporation ("EEG"), appears not and is in default. The Court, after having examined the files and records in this cause and being fully advised in the premises, finds as follows:

1. On July 3, 1991, this Court entered in personam judgments in favor of the FDIC as follows:

a. Against Defendants Christopher and Enterline on a note and guaranty in the amount of $72,254.47 in principal and interest accrued through June 1, 1990, with interest accruing thereafter at the per diem rate of $18.96 until paid ("Enterline Judgment").

The following property was ordered sold in partial satisfaction of the Enterline Judgment:

Lot Eighteen (18), Block Two (2); Lot Six (6) and Twenty-Seven (27), Block Three (3); Lot Four (4), Block Four (4); AND: Lot Two (2) and Five (5), Block One (1); Lot Sixteen (16), Block Eight (8); all in LAKERIDGE ADDITION to the City of Owasso, Tulsa County, Oklahoma (the "Lakeridge Property");

b. Against Mark En in the amount of $555,484.43 in principal and interest through June 1, 1990 with interest accruing thereafter at the per diem rate of $172.99 until paid ("Mark En Judgment"); and

c. Against EEG in the amount of $596,180.56 in principal and interest through May 16, 1991 with interest accruing thereafter at the per diem rate of $171.80 until paid ("EEG Judgment").

The following property was ordered sold in partial satisfaction of both the Mark En and EEG Judgments:

Lot 1 Right and Lot 1 Left, Block 6, Rockwood West Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma (a/k/a 1609-11 W. Madison)

and

Lot 14 Right and Lot 14 Left, Block 6, Rockwood West Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma (a/k/a 1608-10 W. Madison)

and

Lot 7 Left and Lot 7 Right, Block 6, Rockwood West Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma (a/k/a 1401-03 W. Madison)

and

Lot 8 Right and Lot 8 Left, Block 6, Rockwood West Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma (a/k/a 1400-02 W. Lansing)

and

Lot 20 Left and Lot 20 Right, Block 4, Rockwood West Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, (a/k/a 1608-10 W. Lansing) (all collateral collectively referred to as the "GED Property").

2. On September 26, 1991, the GED Property and the Lakeridge Property were sold at Sheriff's Sale by the Sheriff of Tulsa County, Oklahoma as follows:

Legal Description of Property	Bid Price	Purchaser
Lot 18, Block 2, LAKERIDGE ADDITION to the City of Owasso, Tulsa County, OK (a/k/a 8908 N. 124th E. Ave.)	$10,005	William R. and Candice M. Gideon 3105 S. 147th E. Ave. Apt. B Tulsa, Oklahoma (918) 437-7575
Lot 6, Block 3, LAKERIDGE ADDITION to the City of Owasso, Tulsa County, OK (a/k/a 12411 E. 90th St. North)	$10,003	Elaine Malanga 12413 E. 90th St. N. Owasso, Oklahoma (918) 272-7480
Lot 27, Block 3, LAKERIDGE ADDITION to the City of Owasso, Tulsa County, OK (a/k/a 8905 N. 125th E. Ave.)	$10,002	Charles L. Burris 12005 E. 87th Pl. N. Owasso, OK 74055 (918) 581-7447
Lot 2, Block 1, LAKERIDGE ADDITION to the City of Owasso, Tulsa County, OK (a/k/a 8914 N. 123rd E. Ave.)	$10,001	FDIC
Lot 5, Block 1, LAKERIDGE ADDITION to the City of Owasso, Tulsa County, OK (a/k/a 8908 N. 123rd E. Ave.)	$10,002	Charles L. Burris 12005 E. 87th Pl. N. Owasso, OK 74055 (918) 581-7447

Lot 16, Block 8, LAKERIDGE ADDITION to the City of Owasso, Tulsa County, OK (a/k/a 8708 N. 124th E. Pl.)	$10,002	Charles L. Burris 12005 E. 87th Pl. N. Owasso, OK 74055 (918) 581-7447
Lot 1 Right and Lot 1 Left, Block 6, ROCKWOOD WEST ADDITION to the City of Broken Arrow, Tulsa County, Oklahoma (a/k/a 1609-11 W. Madison)	$50,003	FDIC
Lot 14 Right and Lot 14 Left, Block 6, ROCKWOOD WEST ADDITION to the City of Broken Arrow, Tulsa County, Oklahoma (a/k/a 1608-10 W. Madison)	$50,003	FDIC
Lot 7 Left and Lot 7 Right, Block 6, ROCKWOOD WEST ADDITION to the City of Broken Arrow, Tulsa County, Oklahoma (a/k/a 1401-03 W. Madison)	$50,003	FDIC
Lot 8 Right and Lot 8 Left, Block 6, ROCKWOOD WEST ADDITION to the City of Broken Arrow, Tulsa County, Oklahoma (a/k/a 1400-02 W. Lansing)	$50,003	FDIC
Lot 20 Left and Lot 20 Right, Block 4, ROCKWOOD WEST ADDITION to the City of Broken Arrow, Tulsa County, Oklahoma (a/k/a 1608-10 W. Lansing)	$50,003	FDIC

those being the highest sums bid therefore, said sums being a fair and reasonable market value of the respective properties as of the date of said sale.

3. Following the sale of the Lakeridge Property for $60,015.00, there leaves a deficiency to be awarded against Christopher and Enterline, jointly and severally, in the amount of

$12,722.37, plus interest from September 26, 1991 at the rate of 8% per annum.

a. This deficiency amount was calculated as follows:

principal and interest due through September 26, 1991 on the Enterline Judgment		$81,412.15
plus July 31, 1991 cost award (33%)		$325.16
less Lakeridge Property sheriff's sale proceeds	<60,015.00>	
less proceeds from third party sale	< 9,000.00>	
TOTAL DUE FROM CHRISTOPHER AND ENTERLINE		$ 12,722.37

4. Following the sale of the GED Property for $250,015.00, there leaves a deficiency to be awarded as follows:

Against Mark En in the amount of $500,577.84 plus interest from September 26, 1991 at the rate of 9 1/2% per annum; and

Against EEG in the amount of $480,569.22, plus interest from September 26, 1991 at the rate of 12% per annum.

a. These deficiency amounts were calculated as follows:

i. Principal and interest accrued through September 26, 1991 on the Mark En Judgment $639,038.58

plus July 31, 1991 cost award (33%)		$325.16
less GED Property sheriff's sale proceeds (50%)	<125,007.50>	
less net proceeds paid to the FDIC by the court-appointed Receiver (50%)	<13,778.40>	
TOTAL DUE FROM MARK EN		$500,577.84

ii. Principal and interest accrued through September 26, 1991 on the EEG Judgment		$619,029.96
plus July 31, 1991 cost award (33%)		$325.16
less GED Property sheriff's sale proceeds (50%)	<125,007.50>	
less net proceeds paid to the FDIC by the court-appointed Receiver (50%)	<13,778.40>	
TOTAL DUE FROM EEG		**$480,569.22**

5. On December 17, 1991, the FDIC filed its Motion for Leave to Enter Deficiency Judgment with Supporting Brief against the above-named Defendants as specified herein.

6. The above-named Defendants having filed no objection to such motion, the motion is deemed confessed. In all instances the terms of the deficiency awarded hereby are the same as the terms sought in the confessed motion, except that the deficiency awarded hereby gives proper credit for proceeds paid to the FDIC by the court-appointed receiver.

7. All Defendants have been given proper and adequate notice of the FDIC's Motion for Deficiency Judgment, consistent with requirements of Okla. Stat. tit. § 686 and both state and federal due process requirements.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff, the Federal Deposit Insurance Corporation in its corporate capacity as holder of assets of the failed Utica National Bank & Trust Co., be and hereby is awarded a Deficiency Judgment against the Defendants, Christopher Design Homes, Inc. and Mark C.

Enterline, jointly and severally, in the amount of $12,722.37, plus interest from September 26, 1991 at the rate of 8% per annum.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff, the Federal Deposit Insurance Corporation in its corporate capacity as holder of assets of the failed Utica National Bank & Trust Co., be and hereby is awarded a Deficiency Judgment against the Defendant, Mark En, Limited, in the amount of $500,577.84 plus interest from September 26, 1991 at the rate of 9 1/2% per annum; and against Defendant, E.E.G. Corporation, in the amount of $480,569.22, plus interest from September 26, 1991 at the rate of 12% per annum, plus all costs of this action, accrued and accruing.

S/ THOMAS R. BRETT

HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By: _____
Jeffrey R. Schoborg, OBA #10603
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2696

ATTORNEYS FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY AS HOLDER OF ASSETS OF THE FAILED UTICA NATIONAL BANK & TRUST CO.

APPROVED AS TO FORM AND CONTENT:

ALBRIGHT & GILSINGER

By: _____

Dale J. Gilsinger
2601 Fourth National Bank Bldg.
15 West 6th Street
Tulsa, Oklahoma 74119
(918) 583-5800

ATTORNEYS FOR CHRISTOPHER DESIGN HOMES, INC., MARK EN, LIMITED, G.E. DUPLEXES, INCORPORATED AND MARK C. ENTERLINE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
BEVERLY CHASTAIN a/k/a BEVERLY K. CHASTAIN; WILLIE WILFORD ALFORD; BETTY L. FRYE; COUNTY TREASURER, Nowata County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Nowata County, Oklahoma,	)	
	)	
Defendants.	)	CIVIL ACTION NO. 91-C-423-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27 day of March, 1992. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney; the Defendant, Betty L. Frye, appears by her attorney, Michael A. Abel; and the Defendants, Beverly Chastain a/k/a Beverly K. Chastain, Willie Wilford Alford, County Treasurer, Nowata County, Oklahoma, and Board of County Commissioners, Nowata County, Oklahoma, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Willie Wilford Alford, acknowledged receipt of Summons and Complaint on June 19, 1991; that the Defendant, Betty L. Frye, was served with Summons and Complaint on October 25, 1991; that the Defendant, County Treasurer, Nowata County, Oklahoma, acknowledged receipt of Summons and Complaint on June 19, 1991; and that Defendant, Board

of County Commissioners, Nowata County, Oklahoma, acknowledged receipt of Summons and Complaint on June 19, 1991.

The Court further finds that the Defendant, Beverly Chastain a/k/a Beverly K. Chastain, was served by publishing notice of this action in the Nowata Star, a newspaper of general circulation in Nowata County, Oklahoma, once a week for six (6) consecutive weeks beginning November 28, 1991, and continuing to January 2, 1992, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, Beverly Chastain a/k/a Beverly K. Chastain, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, Beverly Chastain a/k/a Beverly K. Chastain. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Farmers Home Administration, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams,

Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendant, Betty L. Frye, filed her Answer on October 31, 1991; and that the Defendants, Beverly Chastain a/k/a Beverly K. Chastain; Willie Wilford Alford; County Treasurer, Nowata County, Oklahoma; and Board of County Commissioners, Nowata County, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Nowata County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lots 6, 7, & 8 in Block 9, in J.R. Rogers Addition to the City of Nowata, Oklahoma.
>
> Subject, however, to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations, and mineral conveyances of record.

The Court further finds that on May 30, 1986, the Defendant, Beverly K. Chastain, executed and delivered to the United States of America, acting through the Farmers Home

Administration, her mortgage note in the amount of $31,450.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Beverly K. Chastain, executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated May 30, 1986, covering the above-described property. Said mortgage was recorded on June 2, 1986, in Book 567, Page 734, in the records of Nowata County, Oklahoma.

The Court further finds that on May 30, 1986, the Defendant, Beverly K. Chastain, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on June 28, 1987, the Defendant, Beverly K. Chastain, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on March 28, 1988, the Defendant, Beverly Chastain, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which

the interest rate on the above-described note and mortgage was reduced.

The Court further finds that the Defendant, Beverly Chastain a/k/a Beverly K. Chastain, made default under the terms of the aforesaid note, mortgage, and interest credit agreements by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Beverly Chastain a/k/a Beverly K. Chastain, is indebted to the Plaintiff in the principal sum of $31,546.46, plus accrued interest in the amount of $6,140.30 as of October 26, 1990, plus interest accruing thereafter at the rate of 9.5 percent per annum or $8.2107 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of $4,652.73, plus interest on that sum at the legal rate from judgment until fully paid, and the costs of this action in the amount of $286.05 ($20.00 docket fees, $15.00 fees for service of Summons and Complaint, $243.05 publication fees, $8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, Beverly Chastain a/k/a Beverly K. Chastain; Willie Wilford Alford; County Treasurer, Nowata County, Oklahoma; and Board of County Commissioners, Nowata County, Oklahoma, are in default and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, Betty L. Frye, has an easement and right of way over and across the real property which is the subject matter of this action which is

dated July 29, 1981 and recorded July 30, 1981 in the records of Nowata County, Oklahoma in Book 528, Page 393.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendant, Beverly Chastain a/k/a Beverly K. Chastain, in the principal sum of $31,546.46, plus accrued interest in the amount of $6,140.30 as of October 26, 1990, plus interest accruing thereafter at the rate of 9.5 percent per annum or $8.2107 per day until judgment, plus interest thereafter at the current legal rate of 4.58 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of $4,652.73, plus interest on that sum at the legal rate from judgment until fully paid, and the costs of this action in the amount of $286.05 ($20.00 docket fees, $15.00 fees for service of Summons and Complaint, $243.05 publication fees, $8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, subject to a certain easement to Betty L. Frye dated July 29, 1981 and recorded July 30, 1981 in the records of Nowata County, Oklahoma in Book 528, Page 393, and all other easements of record.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Beverly Chastain a/k/a Beverly K. Chastain, Willie Wilford Alford, County Treasurer and Board of County Commissioners, Nowata County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

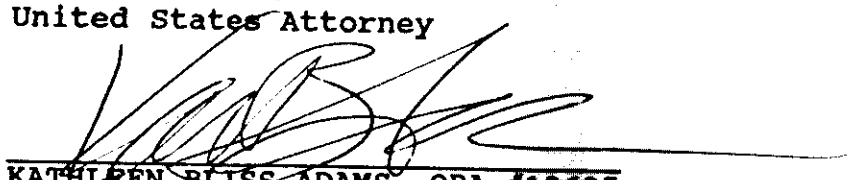
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney



KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

MICHAEL A. ABEL, OBA #10614
Attorney for Defendant, Betty L. Frye

Judgment of Foreclosure
Civil Action No. 91-C-423-B

KBA/esr

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
RONALD JOE ANDERSON; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	CIVIL ACTION NO. 92-C-038-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27th day of March, 1992. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear not, having previously filed their Answers disclaiming any right, title or interest in the subject property; and the Defendant, Ronald Joe Anderson, appears not, but makes default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Ronald Joe Anderson, acknowledged receipt of Summons and Complaint on February 1, 1992; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 21, 1992; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 21, 1992.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on February 4, 1992, disclaiming any right, title or interest in the subject property; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on February 4, 1992, disclaiming any

right, title or interest in the subject property; and that the Defendant, Ronald Joe Anderson, has failed to answer and his default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Six (6), Block Two (2), HILLSIDE ESTATES, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on November 3, 1982, the Defendant, Ronald Joe Anderson, executed and delivered to Mercury Mortgage Co., Inc. his mortgage note in the amount of $52,150.00, payable in monthly installments, with interest thereon at the rate of twelve and one-half percent (12.50%) per annum, which also provided that deferred interest would be added to the principal balance monthly but would increase the principal balance to not more than $56,550.17. On April 27, 1989, the Note was reamortized, resulting in a reamortized principal amount of $60,887.12, with interest accruing thereon from May 1, 1989, at the rate of ten and one-half percent (10.50%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Ronald Joe Anderson, a single person, executed and delivered to the Mercury Mortgage Co., Inc., a mortgage dated November 3, 1982, with the same provision concerning deferred interest as contained in the Note and set forth in the above paragraph, covering the above-described property. Said mortgage was recorded on November 5,

1982, in Book 4648, Page 1400, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 11, 1989, the interest of Mercury Mortgage Co., Inc. was assigned to the Secretary of Veterans Affairs, an Officer of the United States of America, by Assignment of Mortgage recorded in Book 5200 at Page 2582 in the records of Tulsa County, Oklahoma. This Assignment erroneously refers to the mortgage being assigned as bearing the date of April 11, 1989, which is the date of the Assignment.

The Court further finds that the Defendant, Ronald Joe Anderson, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Ronald Joe Anderson, is indebted to the Plaintiff in the principal sum of $57,157.91, plus interest at the rate of ten and one-half percent (10.50%) per annum from February 1, 1991 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendant, Ronald Joe Anderson, is in default and has no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Ronald Joe Anderson, in the principal sum of $57,157.91, plus interest at the rate of ten and one-half (10.50%) percent per annum from February 1, 1991 until judgment, plus interest thereafter at the current legal rate of 4.58 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Ronald Joe Anderson, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Ronald Joe Anderson, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 92-C-038-B

PB/esr

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FDIC AS RECEIVER FOR FIRST NATIONAL BANK & TRUST COMPANY, CUSHING, OKLAHOMA, et al,	)	
Plaintiff,	)	
v.	)	90-C-39-B
ASBESTOS DISPOSAL SERVICES, et al,	)	
Defendants.	)	

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed March 4, 1991 in which the Magistrate Judge recommended that this court "do equity" and find that 1) its order directing the United States Marshal to sell the foreclosed property was violated; and 2) substantively, that *de facto* "remand" of the action to the state court for purposes of sale and confirmation of sale of the property was improper, violating Rule 69 and Title 28 U.S.C. §2001 and Title 12 O.S. §686. As a result of the foregoing the United States Magistrate Judge further recommended that the court find that the motion for deficiency judgment was not made as prescribed by the statute (§686) and that the debt owed by Defendants be deemed to be fully satisfied by the sale proceeds, according to the terms of that statute. The Magistrate Judge further recommended that Plaintiffs be ordered not to proceed with entry of a deficiency in the State court in this matter as well.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

Dated this 27 day of Mar, 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MASSEY GAS SYSTEMS, a Tennessee General Partnership,

Plaintiff,

v.

NORMANDY OIL AND GAS COMPANY, INC., a New York Corporation; NORMANDY GATHERING AND PROCESSING CORPORATION, a Delaware corporation; and NORTHEAST UTAH GAS CORP., a Texas corporation, d/b/a NEU Gas Corp.;

and

M.G.M. ENERGY CORP., an Oklahoma corporation; and DRESSER-RAND COMPRESSION SERVICES,

Defendants.

Case No. 92-C-162 E

NOTICE OF PARTIAL DISMISSAL WITH PREJUDICE OF DEFENDANT DRESSER-RAND COMPRESSION SERVICES

Plaintiff Massey Gas Systems hereby Dismisses With Prejudice Defendant Dresser-Rand Compression Services from the above-styled case, each party to bear their respective costs and fees.

Christopher S. Heroux, OBA #11859
Kevin M. Pybas, OBA #14798
HOLLIMAN, LANGHOLZ, RUNNELS & DORWART
Ten East Third Street
Holarud Building, Suite 700
Tulsa, Oklahoma 74103-3695
(918) 584-1471

OF COUNSEL:

Thomas N. Amonett
Terry Radney
FULBRIGHT & JAWORSKI
1301 McKinney, Suite 5100
Houston, Texas 77010
(713) 651-5151

CERTIFICATE OF MAILING

I hereby certify that on this 27 day of March, 1992, I caused to be placed in the United States mail at Tulsa, Oklahoma, a true and correct copy of the above and foregoing NOTICE OF PARTIAL DISMISSAL WITH PREJUDICE OF DEFENDANT DRESSER-RAND COMPRESSION SERVICES, with proper postage fully prepaid, and addressed to the following:

Normandy Oil and Gas Company. Inc.
c/o Roy T. Rimmer, Jr., President
4550 Post Oak Place, Suite 175
Houston, Texas 77027-3106

Normandy Gathering and Processing Corporation
c/o Roy T. Rimmer, Jr., President
4550 Post Oak Place, Suite 175
Houston, Texas 77027-3106

Northeast Utah Gas Corp., d/b/a
NEU Gas Corp.
c/o Roy T. Rimmer, Jr., President
4550 Post Oak Place, Suite 175
Houston, Texas 77027-3106

M.G.M. Energy Corp.
c/o Roger P. Metcalf
6030 S. 66th East Avenue
Tulsa, Oklahoma 74136

Thomas M. Ladner
NORMAN & WOHLGEMUTH
2900 Mid-Continent Tower
Tulsa, OK 74103

Attorneys for Dresser-Rand Compression Services

Kevin M. Pybas

03232860.02\5473.004

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MID-CONTINENT CASUALTY COMPANY, an Oklahoma corporation, Plaintiff,	)	
v.	)	No. 91-C-538-B
FRANK G. LUCA and CARMELA LUCA, Defendants,	)	
and	)	
STAR PRODUCTION, INC., d/b/a TEX-STAR PRODUCTION, Intervenor.	)	

JUDGMENT

In keeping with the Order sustaining the Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56 of the Plaintiff, Mid-Continent Casualty Company, this date, Judgment is hereby entered in favor of Mid-Continent Casualty Company and against the Defendants, Frank G. Luca and Carmela Luca, and Intervenor, Star Production, Inc., d/b/a Tex-Star Production, the Court concluding and declaring that the subject general liability insurance policy provides no coverage to said Defendants and Intervenor in reference to the state court action of Jaco, et al., vs. Aries, et al., Case No. S-C-90-16, in the District Court in and for Seminole County, Oklahoma, and the judgment obtained therein by the Intervenor against the Defendants herein. Costs are assessed against the Defendants if timely applied for pursuant to Local Rule 6, and the

parties are to pay their own respective attorneys fees.

DATED this 27th day of March, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

GG/cac/eakin.ord

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID BRYAN AND MARY JUDITH EAKIN, individually and as husband and wife,

Plaintiffs,

vs.

BLUE CROSS AND BLUE SHIELD OF OKLAHOMA, an Oklahoma corporation, individually and as Administrators of Health Insurance Coverage for TEFCO LITHOGRAPHERS, INC.,

Defendant.

Case No. 90-C-552-B

ORDER

Comes now on for hearing the parties Application For Dismissal With Prejudice. The Court being fully advised in the premises finds that the above-styled matter should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that the above-styled matter is dismissed with prejudice.

S/ THOMAS R. BRETT

JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

JOE BUFOGLE
BUFOGLE & ASSOCIATES
3105 East Skelly Drive
Suite 600
Tulsa, OK 74105
Attorney for Plaintiffs

JAMES K. SECREST, II
Oklahoma Bar No. 8049
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Tulsa, OK 74136
Telephone: (918) 494-5905
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STOREBRAND INSURANCE CO., (U.K.) LTD.,

Plaintiff,

vs.

I.P.I. SERVICES, INC., et al.,

Defendants.

No. 91-C-597-E

O R D E R

Comes now before the Court for consideration Defendants' motion to dismiss. After review of the Defendants' motion and Plaintiff's response, the Court finds Defendants' motion to dismiss should be denied.

The Court recognizes and bases its ruling on Horace Mann Insurance Co. v. Johnson, 953 F.2d 575 (10th Cir. 1991), which reversed and remanded the District Court holding stating that the Court:

> "abused its discretion under the Federal Declaratory Judgment Act when it declined to exercise jurisdiction over action instituted by insurer to determine coverage under policy, on the ground that permitting parties to invoke diversity jurisdiction to litigate liability insurance declaratory judgment actions in federal court would result in impermissible discrimination in Oklahoma, since Oklahoma's Declaratory Judgment statute specifically excludes actions to construe coverage under liability policies; by its very nature, diversity jurisdiction always provides a federal forum to those parties who can invoke it while denying forum to those parties who cannot." 28 U.S.C.A. §§2201, 2202; 12 Okla.St.Ann. §1651.

Accordingly, this Court finds jurisdiction is proper.

IT IS THEREFORE ORDERED that Defendants' motion to dismiss is denied.

ORDERED this 26th day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SCOTT O'DELL HINDS, an individual,

Plaintiffs,

v.

PEACHTREE MEDICAL RENTALS, INC., a Georgia Corporation; PEACHTREE PATIENT CENTER, INC., a Georgia Corporation; PEACHTREE TECHNOLOGIES, INC., a Georgia Corporation; PEACHTREE PATIENT CENTER CORPORATION, a Georgia Corporation, INVACARE CORPORATION, an Ohio Corporation; WHEELCHAIR HOUSE, LTD., a Colorado Corporation; BILL TUTTLE, an individual; CRAIG HOSPITAL, a Colorado Corporation,

Defendants.

Case No. 91 C 915 B

FILED
MAR 26 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Notice of
DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Scott O'Dell Hinds, and hereby Dismisses Without Prejudice, Defendant, Peachtree Patient Center Corporation, a georgia corporation, pursuant to Federal Rules of Civil Procedure rule 41(a)(1), reserving any and all causes of action against all other Defendants included herein.

RICHARDS, PAUL, RICHARDS & SEIGEL

Nancy J. Siegel, Esq.
Nine East Fourth Street
Tulsa, Oklahoma 74103-5118
Attorney for Defendant

ROBERTS, MARRS & CARSON

C. Clay Roberts, III OBA 7632
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110 South Hartford, Suite 111
Tulsa, Oklahoma 74120
(918) 582-6567
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 92-C-103-E
	)	
FRANCIS E. HEYDT COMPANY,	)	
	)	
Defendant.	)	

O R D E R

This matter was heard by the Court on the 20th day of March, 1992. Upon consideration of the pleadings, the briefs submitted by the parties, testimony produced at the hearing and arguments of counsel, the Court makes the following Findings of Fact and enters the following Conclusions of Law and Order.

FINDINGS OF FACT

1. This action is brought by the United States of America ex rel. United States Department of Defense and this Court has jurisdiction by reason of 28 U.S.C. §§1331 and 1345.
2. Francis E. Heydt Company, Defendant, is a resident of the Northern District of Oklahoma with its principle place of business at Commerce, Oklahoma within the Northern District.
3. In March of 1989 DPSC awarded the Sac & Fox Tribe a contract for the manufacture and delivery of certain chemical protective suits. DPSC terminated this contract for default for failure to make delivery under the

contract.

4. The government contract contains a progress payment clause which gave the Sac & Fox Tribe the right to receive monthly progress payments from the United States equal to 80% of costs incurred.

5. The progress payments clause contains a title vesting provision which provides that title to all "parts, materials, inventories and work in process" vests in the United States when "the property is or should have been allocable or properly chargeable to this contract".

6. The Sac & Fox Tribe progress billed the United States pursuant to the progress payments clause in an amount in excess of $5 million dollars. These payments were used to purchase materials and components to be used in the production of the suits and to partially assemble them.

7. Under the provisions of the title vesting provision of the government contract as the materials were manufactured or procured under the contracts, title automatically vested in the United States.

8. These suits and materials were stored at Heydt's facilities located in Idabel, Oklahoma and Commerce, Oklahoma.

9. The Sac & Fox Tribe had leased these facilities from Heydt.

10. Daniel G. Wolfinger, Administrating Contracting Officer for DPSC, formally advised Heydt of the government's

intention to remove its property by letter dated January 30, 1992.

11. Heydt asserts a lien against the contract material for storage costs which lien is unrelated to the government contract. Heydt claims its lien against the contract material under the provision of 42 Okl.St.Ann. §91(a).

12. The specific language of the title vesting provision is as follows:

> Title to the property described in this paragraph (d) shall vest in the Government. Investiture shall be immediately upon the date of this contract, for property acquired or produced before that date. Otherwise, investiture shall occur when the property is chargeable to this contract.

13. Any Finding of Fact which would more appropriately termed Conclusion of Law will be so considered.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of these proceedings.

2. The title vesting provision at issue in this case was sufficient to vest title to the materials and components in the government. United States v. Ansonia Brass & Copper Company, 218 U.S. 452 (1910).

3. Defendant relies upon Marine Midland Bank v. United States, 687 F.2d 395 (Ct. Cl. 1982), cert. denied, 460 U.S. 1037 (1983) for the proposition that the title

vesting provision creates only a lien in favor of the United States. If the Court were to adopt the reasoning of Marine Midland, which the Court declines to do, the Plaintiff would still prevail because under its holding government procurement practices require "standardization and uniformity throughout the federal system" and government liens would be paramount to private liens and immune from state laws in regard to lien perfection.

4. Defendant's assertion of priority under Oklahoma's Commercial Code (12A O.S. §9-310) is based upon Defendant's assumption that it has a valid, possessory, storageman lien pursuant to 42 O.S. §91. But such a lien is dependent on lawful possession; and government property, for the most obvious of reasons of public policy, cannot be seized by authority of another sovereignty against the consent of the government. Since the government has not consented, the Defendant does not have priority.

IT IS THEREFORE ORDERED that the Defendant Francis E. Heydt Company permit the Plaintiff, United States of America, to retrieve its personal property with the assistance of the United States Marshall.

So ORDERED this 26th day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CAROL J. CURNUTTE, ROBERT A. SMITH AND DAVEY D. BOYD,

Plaintiffs,

vs.

JAMES H. ALLEN, DAVID L. ROBERTS, GENEVA K. RECORDS, and RICHARD ENYART, as members of the Business Committee, Seneca-Cayuga Tribe,

Defendants.

Case No. 91-C-364-B

ORDER

This matter comes on for consideration upon Defendant's Motion to Dismiss. Plaintiffs, members of the Seneca-Cayuga Tribe, filed suit in the U.S. District Court seeking compensatory damages and injunctive relief alleging that their employment with the Seneca-Cayuga Tribe was unlawfully terminated by the Defendants, members of the Business Committee of the Tribe. Plaintiffs assert this Court has jurisdiction based on the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §1302. Defendants have moved to dismiss the case pursuant to Fed.R.Civ.P. 12(b)(1) for lack of jurisdiction and Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted, alleging sovereign immunity prevents federal jurisdiction over claims based on the ICRA.

In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the Supreme Court held that the ICRA does not create a federal civil cause of action upon which a suit in federal court might be based for violation of the Act's guarantees. The Court opined that

"providing a federal forum for issues arising under §1302 [of ICRA] constitutes an interference with tribal autonomy and self-government," and the Court would not interfere without express manifestation of congressional intent. Id. at 59. The Court found that "nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts for injunctive or declaratory relief." Id. Further, the Court found the legislative history of ICRA suggested that congress' failure to provide remedies other than habeas corpus was deliberate. The Court held that:

> Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with §1302, plainly would be at odds with the congressional goal of protecting tribal self government . . . .
> Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. . . . Congress considered and rejected proposals for federal review of alleged violations of the Act arising in a civil context.

Id. at 64-65.

The Tenth Circuit declined to apply the holding of Martinez in Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 118 (1981). The dispute in Dry Creek arose when a tribe cut access to a non-Indian's land. The plaintiff sued the tribe, claiming his constitutional rights had been violated. When the tribal court refused to hear the case, the plaintiff brought suit in federal court. The Tenth Circuit distinguished the facts of the case from Martinez. The Court emphasized the total lack of a forum and distinguished Martinez by

pointing out that:

> [Martinez] was entirely an internal matter concerning tribal members and a matter of very great importance to the individuals . . . . The problem was thus strictly an internal one between tribal members and the tribal government relating to the policy of the Tribe as to its membership. Of course, there were no non-Indians concerned.
>
> Id. at 685.

Since deciding Dry Creek, the Tenth Circuit has limited its applicability. White v. Pueblo of San Juan, 728 F.2d 1307 (10th Cir. 1984); Jacarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th cir. 1982); Ramsey Construction v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982). In Ramsey, the Court declined to apply Dry Creek, stating that "that case involved particularly egregious allegations of personal restraint and deprivation of personal rights that are not present in this action." Ramsey, 673 F.2d at 319, n.4. In White, the plaintiffs had not sought a trial at the tribal level, while in Dry Creek, the plaintiffs had sought a trial but had been denied a forum on sovereign immunity grounds. In that case the Court found this difference determinative and stated the aggrieved party must have actually sought a tribal remedy, not merely alleged its futility. White, 728 f.2d at 1312. The Court also held that Dry Creek "requires[s] narrow interpretation." Id. In Jacarilla, the tribe successfully moved to dismiss counterclaims by the defendant against the tribe brought under the ICRA. On appeal, the Court affirmed and distinguished Martinez by pointing out in Martinez, the non-Indian plaintiffs had demonstrated that they had "'no

remedy within the tribal machinery nor with the tribal officials in whose election they cannot participate.'" Jacarilla, 623 F.2d 1346, quoting Martinez, 623 F.2d at 685.

Defendant argues that Dry Creek controls the jurisdictional issued raised by this case. In so arguing, Defendant avers that, like the facts in Dry Creek, tribal remedies were not available to Plaintiffs as a result of tribal officials canceling the post termination hearing because the Plaintiffs' time had run. Plaintiffs, on the other hand, contend tribal remedies were in place and that, unlike the facts presented by Dry Creek, Plaintiffs were not denied access to tribal courts but rather Plaintiffs did not act in a timely fashion and did not take advantage of available remedies.

The Court finds the case at bar to be factually distinguishable from Dry Creek. First, all the parties in this case are members of the Seneca-Cayuga Tribe. Second, the dispute in this case is intra-tribal in nature, involving employment decisions made by Defendants in their capacity as Business Committee members. Finally, remedies were available within the tribal machinery. Specifically, remedies were available to Plaintiffs under the grievance procedure set out in the Seneca-Cayuga Personnel Policies and Procedures Manual. Even if tribal members acted arbitrarily in denying Plaintiffs a post-termination hearing, Plaintiffs could have exercised their rights and appealed that decision before the appropriate administrative agency or the tribal council. There simply was not a total denial of a tribal

forum as was present in Dry Creek. Accordingly, Defendant's Motion to Dismiss should be and the same is hereby SUSTAINED.

IT IS SO ORDERED THIS 26th day of March, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity,	)	
Plaintiff,	)	
v.	)	Case No. 90-C-953-B
RELL SCHWAB, III, ERIC SCHWAB, TOTAL SERVICE, INC., an Oklahoma Corporation, WELL LOGGING, INC., an Oklahoma Corporation, C.G. DELOZIER, FLORENCE SCHWAB, RELL SCHWAB, JR. and INDIVIDUAL DOES 1-10, inclusive,	)	
Defendants.	)	

O R D E R

This matter came on for hearing this date pursuant to Order of the Court.

The Court first considers the Application of Lacombe, Fairfax & Associates, Inc. to Substitute For Federal Deposit Insurance Corporation In Its Corporate Capacity As Plaintiff. According to the pleadings of Lacombe, Fairfax & Associates (Lacombe), it is incorporated in the State of California and has "purchased the interests of FDIC in this action, to the extent such cause of action is assignable by Oklahoma law." Lacombe alleges FDIC consents to such substitution. James Branum has entered his appearance for FDIC herein, and is also counsel for Lacombe.

The Court concludes the Application of Lacombe to be substituted as Plaintiff for FDIC should be and the same is

herewith GRANTED.

This matter was earlier set for hearing on March 13, 1992, after proper notice to the parties. Attorney James Branum, attorney of record for FDIC failed to appear for the March 13th hearing and failed also to communicate, either before or after the March 13th date, with either the Court or opposing counsel in explanation of such failure to appear at that scheduled hearing.

In response to Attorney Branum's failure to appear, the Court sent Attorney Branum a letter on March 13, 1992, advising:

> The captioned case was previously set for today for pretrial conference and hearing on motions (of which there are numerous pending). The record reflects that you were aware of the scheduling from your previous requests for continuances. You failed to appear today on behalf of the Plaintiff without any explanation.
>
> The matter has now been reset for Thursday, March 26, 1992, at 8:45 A.M. Be here ready to discuss all pending motions and relevant issues or the case will be dismissed for failure to prosecute.

On March 26, 1992, at 8:45 a.m. the Court called its docket. Attorney Branum failed to appear nor did he communicate with the Court or opposing counsel prior to the 8:45 scheduled hearing.

The Court concludes the Plaintiff's five alleged causes of action[1], for alleged fraudulent transfers of property, alleged

[1] The Court notes that significant doubt exists as to the assignability, under Oklahoma law, of the FDIC's fraud claim (Count I). Also, Counts II, III and IV are perhaps subject to dismissal because the parties against whom relief was sought in these counts have never, it appears, been properly served, the time for such service having lapsed. Count V is also arguably subject to dismissal, except as to Total Service, because of service defects and the claim as to Total appears doubtful because of the apparent

breach of fiduciary relationship and alleged conspiracy to defraud the FDIC, should be and the same are herewith DISMISSED WITH PREJUDICE for failure to prosecute. **Anthony v. Marion County General Hospital**, 617 F.2d 1164 (5th Cir.1980); **Gonzalez v. Firestone Tire & Rubber Co.**, 610 F.2d 241 (5th Cir.1980); **Rohauer v. Eastin-Phelan Corp.**, 499 F.2d 120 (8th Cir.1974); **Finley v. Rittenhouse**, 416 F.2d 1186 (9th Cir.1969).

IT IS SO ORDERED this 26th day of March, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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non-assignability of fraud claims under Oklahoma law.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

EMPORIA MOTOR FREIGHT, debtor and EMPORIA MOTOR FREIGHT, THOMAS M. MULLINIX, TRUSTEE ON BEHALF OF THE BANKRUPTCY ESTATE OF EMPORIA MOTOR FREIGHT,

Plaintiff,

vs.

EVANS BOX MANUFACTURING CORPORATION,

Defendant.

Case No. CIV-91-C-461-E

O R D E R

Before the Court is Defendant's Motion for Referral to the Interstate Commerce Commission ("ICC").

This case involves tariff rates. Plaintiff seeks to recover from Defendant the amount it alleges to have undercharged Defendant on shipments of property moving in interstate commerce, based upon the difference between the quoted rate and its alleged published tariff rate. Among other defenses, Defendant contends that the tariff under which Plaintiff has been billed and has paid Defendant in full actually applies to the shipments in question; the tariff under which Plaintiff now demands payment is unlawful and/or inapplicable; and, the tariff under which Plaintiff now demands payment is unlawful and unreasonable under 49 U.S.C. §10704.

Defendant's Motion for Referral is granted. The Clerk is directed to administratively terminate this case. Within 30 days

of the determination by the ICC of the issues involved, counsel for the parties are to file a Motion to Reinstate if any further proceedings are necessary herein. If no motion is filed, without further action by the Court, this case will be dismissed with prejudice.

DATED this 25 day of March, 1992.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

entd

FILED

MAR 25 1992

RICHARD M. LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	}	
	}	
Plaintiff,	}	
	}	
vs.	}	No. 89-CR-77-C
	}	No. 90-C-746-C
	}	
STEVEN WILLIAM VANLUE,	}	
	}	
Defendant.	}	

ORDER

Before the Court is the motion of defendant for transcripts. By Order dated March 13, 1992, the Court denied defendant's motion pursuant to 28 U.S.C. § 2255. Defendant now requests, pursuant to 28 U.S.C. § 753(f), transcripts of his arraignment, his change of plea and his sentencing. The record reflects that the latter two transcripts were filed on July 19, 1991. Defendant has made no showing that would require a transcript of his arraignment to be prepared.

It is the Order of the Court that the motion of the defendant for transcripts is hereby denied.

IT IS SO ORDERED this 25th day of March, 1992.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEVEN LIND COLE,

Plaintiff,

vs.

CITY OF TULSA, and JEFF BLAIR,

Defendants.

Case No.: 91-C-864-C

ORDER

Before the Court is the motion filed by defendants to dismiss for failure to state a cause of action.

Plaintiff brings this action, seeking relief under 42 U.S.C. § 1983 of the Civil Rights Act of 1964, as amended, asserting that defendant Jeff Blair, a detective with the Tulsa Police Department, violated his Fifth and Fourteenth Amendment constitutional rights. Plaintiff also joins the City of Tulsa as a party defendant. Aside from identifying defendant Blair as an employee with the City police, plaintiff presents no other factual claim against the City of Tulsa.

Plaintiff contends that he was questioned as a suspect to a crime by Detective Jeff Blair without being advised of his Miranda rights. Detective Blair later testified to a confession allegedly

made by plaintiff which plaintiff contends was inadmissible and in violation of his Miranda rights. In the state court, plaintiff's attorney filed a motion to suppress which was sustained by Judge Robert Perguino but was later overruled by Judge Jay D. Dalton. Plaintiff is presently in custody at Alford Correctional Center.

The Court has carefully reviewed the record and finds plaintiff's action is subject to dismissal. It is settled law within this Circuit that violations of Miranda rights are not actionable under § 1983. In Bennett v. Passic, 545 F.2d 1260, 1263 (10th Cir. 1976), the Court stated:

> The Miranda decision does not even suggest that police officers who failed to advise an arrested person of his rights are subject to civil liability; it requires, at most, only that any confession made in the absence of such advise of rights be excluded from evidence.

Violation of Miranda rights is not a violation of a federal statutory law or of the Constitution. Cooper v. Dupnik, 924 F.2d 1520 (9th Cir. 1991). Miranda rights originated from Miranda v. Arizona, 384 U.S. 436, 444 (1966) wherein the Supreme Court held that statements obtained in violation of the protocol established by the courts would be inadmissible as part of the prosecutor's case-in-chief. Miranda rights are a procedural safeguard in criminal proceedings. Violations of Miranda rights are subject to post-conviction remedies but are not cognizable under § 1983.

Plaintiff has notified the Court by letter that he has not received a copy of defendant's motion to dismiss. Accordingly, the Court directs the Clerk to forward to plaintiff a copy of the motion to dismiss and accompanying brief, along with this Order.

This Order will not become final for thirty (30) days after the date of entry to allow plaintiff an opportunity to review the motion and brief and to submit any additional authority for the Court's consideration. Failure of the plaintiff to respond in thirty (30) days will render this Order final.

IT IS SO ORDERED this 24th day of March, 1992.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GERRY DAVIS, JR.,

Plaintiff,

vs.

D. McGRAFF and B. HORRY,

Defendants.

No. 91-C-516-E

O R D E R

Comes now before the Court for consideration Defendants' motion to dismiss. After review of the Defendants' motion and Plaintiff's response, the Court finds Defendants' motion should be granted.

IT IS THEREFORE ORDERED that Defendants' motion to dismiss is granted and Plaintiff is allowed twenty (20) days from this Order to amend its Complaint.

ORDERED this 25th day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

9

Entered

FILED

MAR 25 1992

RICHARD M. LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DIST OF OK

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOE L. BLANTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Case No.: 91-C-109-C
88-CR-61-C

ORDER

This is the third time petitioner Blanton has been before the Court, asserting claims pursuant to 28 U.S.C. § 2255, challenging his judgment of conviction entered on September 14, 1988, pursuant to his voluntary plea of guilty to violations of 18 U.S.C. §§ 371 and 1001 and 31 U.S.C. §§ 5313 and 5322.

In 1987, petitioner was indicted in the Northern District of Oklahoma on seven counts of alleged violations of 18 U.S.C. §§ 371, 1001, 1002 and 31 U.S.C. §§ 5313 and 5322. Case No. 87-CR-118-C (Tulsa case). In 1988, petitioner was indicted in Dallas, Texas for alleged violation of 18 U.S.C. §§ 371, 3, 1001 and 1002 and 31 U.S.C. §§ 5313 and 5322. That case was transferred to Oklahoma pursuant to F.R.Cr.P. 20. Case No. 88-CR-61-C (Dallas case).

Petitioner entered pleas of guilty pursuant to a negotiated plea agreement with the United States and no direct appeal from either judgement of conviction was taken.

2/32

2 of 3 26

On January 5, 1989 petitioner filed a § 2255 motion raising eleven grounds for vacating his sentences of conviction.[1] This Court denied petitioner's motion on July 22, 1989, holding that petitioner had waived his claims by failing to file a direct appeal. The petitioner appealed. The Tenth Circuit entered its

---

[1]

1. The court erred in imposing a three-year term of supervised release in the Dallas case because the Supreme Court in Bifulco v. United States, 447 U.S. 381 (1980) held that a special parole term cannot be imposed for conspiracy to commit drug offenses under 29 U.S.C. § 846. Defendant acknowledged that he was convicted under 18 U.S.C. § 371, but argued that the two sections are worded "basically the same."
2. The court violated the *ex post facto* clause by applying the Sentence Guidelines to his sentence in the Dallas case because he was not personally involved in the Texas conspiracy after March 11, 1986.
3. The court erred in finding him guilty of aiding and abetting in count two of the Tulsa case because the indictment did not allege the elements necessary for that charge.
4. The indictment in the Tulsa case was inadequate to inform him of the charges to which he pled thereby subjecting him to double jeopardy.
5. The court did not strictly comply with the mandates of F.R.Cr.P. 11 because it failed to establish that he fully understood the charges.
6. The court did not strictly comply with the mandates of F.R.Cr.P. 11 because the court did not determine either that he understood what the alleged conspiracy was or that he had knowledge of or furthered the conspiracy.
7. Petitioner could not be convicted of conspiracy because he only conspired with a government informant who cannot be a true coconspirator.
8. Petitioner was denied due process and equal protection because the Presentence Investigation Report (PSI) contained inaccuracies.
9. Defendant was denied "reasonably effective assistance of counsel" because counsel did not correct court records to show that his name is Joe *not* Joseph; did not listen to 96 tape-recordings of conversations between him and his codefendants; and "failed to make a fact-finding determination on a 3-1/2-hour video of a meeting held in Dallas, Texas between defendant and a coconspirator"; had been drinking when he advised defendant to enter guilty pleas; failed to conduct a proper investigation which would have established his innocence; and, failed to present his objections to the PSI.
10. The Sentencing Guidelines are unconstitutional.
11. Petitioner was entrapped.

opinion on November 14, 1990, remanding with direction that a determination be made whether petitioner voluntarily waived his direct appeal or whether his attorney had failed to file an appeal after being instructed to do so.

On May 28, 1991, the Court conducted an evidentiary hearing and concluded that petitioner had intentionally, knowingly and deliberately bypassed his direct appeal after being timely advised of his right to an appeal by his attorney.

On June 23, 1989, petitioner filed a motion pursuant to Rule 35(a) to correct an alleged illegal sentence. In this pleading, petitioner challenged the imposition of the special assessment, and the order assessing restitution and a fine under the Sentencing Guidelines. This motion was denied by the Court on September 19, 1989. Petitioner appealed.

On July 28, 1989, petitioner filed a second motion pursuant to § 2255 alleging that his presentence report contained mistakes. The Court denied relief on September 18, 1989 and petitioner appealed. The Tenth Circuit denied relief holding that the issue raised had previously been raised in the former § 2255 motion and thus constituted a successive petition. Petitioner also urged in that appeal that there was an unfair disparity in the sentencing between him and his codefendant in the Tulsa case. The Tenth Circuit did not address these issues for failure of petitioner to initially raise them before the district court.

Currently before the Court is petitioner's third attempt at a § 2255 motion for relief. In this petition, he challenges his conviction and sentence, based on the following grounds:

(1) His plea of guilty in 88-CR-61-C should be withdrawn to prevent "manifest of injustice" caused by deceit and fallacious advice of counsel. Petitioner's involvement in the acts alleged terminated in August 1986, a period of time prior to the effective dates of the Sentencing Guidelines. Petitioner plead guilty to the Superseding Indictment without being informed by his counsel of these errors in the Superseding Indictment or without a full understanding of the charges brought against him. Petitioner asserts his counsel advised him erroneously to enter a plea of guilty and that if he had "proper legal Counsel at the Change of Plea hearing, he would not have changed his plea of Not Guilty." The government filed an ambiguous and otherwise invalid grand jury superseding indictment on March 3, 1988, thus rendering the Rule 20 transfer and plea of guilty void and in violation of his constitutional rights barring double jeopardy, *ex post facto* laws, and punishment for a crime not committed.

(2) His plea of guilty in 88-CR-61-C should be withdrawn to prevent "manifest of injustice" for the failure of the Court to arraign petitioner on the

charges contained in the superseding indictment; failure to provide a written copy of the superseding indictment to petitioner during the change of plea hearing; failure of the superseding indictment to reflect the valid signature of the grand jury foreman; the alteration of the dates contained in the original indictment to a later date, thus changing the nature of the case from a pre-guideline case to a post-guideline case; failure of the Court to explain the consequences of the date change in the superseding indictment; failure of the Court to establish a factual basis for acceptance of petitioner's plea of guilty; and failure of the Court to read all elements of the indictment during the plea hearing.

In essence, petitioner's main contention is that he was not adequately informed by his counsel, the court at either the change of plea hearing or through an arraignment proceeding, or by being provided a copy of the superseding indictment that the original indictment filed in the Dallas case was superseded for the sole purpose of changing a single date in order that the case would be subject to the Sentencing Guidelines. The original indictment in 88-CR-61-C, filed on October 28, 1987, alleged a conspiracy under 18 U.S.C. § 371 in Count One, involving overt acts beginning January 1, 1986 and continuing through October 27, 1987. In contrast, the superseding indictment filed on March 3, 1988 alleges the same conspiracy in Count One but extended the cutoff date to

January 27, 1988. The petitioner contends that, had he been properly informed that the superseding indictment subjected him to the Sentencing Guidelines, he would not have changed his plea to guilty. Petitioner contends that his involvement in the alleged illegal activity had terminated prior to August 1986; and, accordingly the superseding indictment contained inaccurate factual allegations which were unknown to the petitioner at the time of the plea hearing.

The Court finds that petitioner's assertions are not supported by the record. The Court has carefully reviewed the transcript of the change of plea hearing. The record reflects that petitioner was adequately informed of the factual allegations contained within the superseding indictment. Specifically, the Court read from Count One the dates encompassing the conspiracy charged in Count One. (Transcript p. 17.) Petitioner's counsel waived reading the entire charge contained in Count One; however, the Court, by agreement of both parties, read all allegations in which petitioner was specifically named. Petitioner's counsel advised the Court that petitioner was familiar with the indictment, and has visited with the U.S. Attorney. (Transcript pp. 15-16.)

The Court then addressed the petitioner:

THE COURT: I will not read it in its entirety.

MR. GULLEKSON: Thank you, Your Honor.

THE COURT: You are familiar with this Count?

THE DEFENDANT: Yes, sir, I am.

THE COURT: You have read each and all provisions of the Count?

THE DEFENDANT: Yes, sir.

THE COURT: And discussed each and all provisions with your attorney; is that correct?

THE DEFENDANT: Yes, sir.

The Court proceeded to read the first five pages of Count One and then directed questions to the petitioner:

THE COURT: And there are many other allegations. And you tell me that you are aware of all of those allegations of other overt acts?

THE DEFENDANT: I've read this document, yes, sir.

THE COURT: And they are a part of and should be considered by you as a part of the charge contained in Count I; you're aware of that?

THE DEFENDANT: Yes, sir.

From a review of the record, the Court finds that petitioner was adequately and properly informed of the charges contained in the superseding indictment. At the change of plea hearing, the Court read that portion of the superseding indictment which contained the dates encompassing the alleged conspiracy. Petitioner acknowledged familiarity with the factual basis and advised the Court he was entering a plea of guilty by choice, voluntarily and knowingly.

Petitioner also expressed satisfaction with his counsel. The Court inquired:

THE COURT: Mr. Gullekson is your attorney; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had ample opportunity to consult with him and he with you in regard to these proceedings and all other matters involving these cases?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with Mr. Gullekson?

THE DEFENDANT: Very.

THE COURT: Do you have any complaints at all in any way?

THE DEFENDANT: None.

Additionally, the Court received evidence at the May 28, 1991 hearing regarding a previously filed § 2255 motion by petitioner which also contained claims of ineffective assistance of counsel. It was patently clear from the evidence offered at that time that petitioner's allegations were blatantly false and that he was adequately and properly represented by Mr. Gullekson.

The Court also finds no prejudice has resulted by the Court's failure to specifically inform petitioner that his Dallas case was subject to the Sentencing Guidelines. At the change of plea hearing, the Court informed petitioner of the maximum statutory

penalty that he would be subject to under each count in which he was entering his plea of guilty. The Court also advised petitioner that each count was a separate offense and that they each separately carried a maximum sentence and that the maximum sentences under each separate count could be combined into a net cumulative penalty.

The Court specifically advised petitioner of the cumulative maximum sentence he would be facing if the Court accepted his pleas of guilty. The Court stated:

THE COURT: In the event you enter a plea of guilty and are found guilty to Count I of Case 88-CR-61, the maximum sentence the Court could impose would be imprisonment not to exceed five years, a fine not to exceed $250,000, or both fine and imprisonment, and a $50.00 special monetary assessment. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: I've explained to you that Counts I and II are separate and distinct charges in 87-CR-118. I also want to tell you that the one count in 88-CR-61 is separate and distinct from the other counts; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: That would mean the total amount, if you plead guilty to Counts I and II of 87-CR-118 and Count I of 88-CR-61, the cumulative total amount of imprisonment the Court could impose shall not exceed 15 years, the total amount cumulative fine that could be imposed could not exceed $750,000, or both fine and imprisonment, and the total amount of special monetary assessment being $50.00 each count would be $150.00. Do you understand that?

THE DEFENDANT: Yes, sir.

The Court thus finds that petitioner was well aware of the maximum cumulative statutory sentence that could be imposed if the Court accepted his pleas of guilty. The fact that the petitioner asserts that he was not advised by his counsel, the court, or from reading the superseding indictment that the charge in Count One subjected him to a sentence under the Sentencing Guidelines is harmless since the petitioner was advised of the statutory cumulative maximum sentence he was facing. In United States v. Gomez-Cuevas, 917 F.2d 1521 (10th Cir. 1990) the Court held that Rule 11(c)(1) only requires the trial court to advise the defendant of the maximum statutory sentence. "The Rule did not require the trial court to inform [the defendant] Gomez that or how the

Guidelines apply." 917 F.2d at 1528. In sum, petitioner has failed to present any credible evidence that he was not informed of the factual allegations contained in the superseding indictment subjecting him to the Guidelines or that he would have elected not to plead guilty had he been specifically so advised by the Court at the hearing.

Petitioner has raised other miscellaneous claims in a desperate attempt to have his guilty plea revoked. By entering a plea of guilty, defendant has effectively waived any claim that the superseding indictment was insufficient. Further, the record clearly sets forth petitioner's recitation of the factual basis for his plea of guilty, and the Court adequately established the factual basis to satisfy the necessary elements of the offense charged.

It is therefore the Order of the Court that petitioner's motion filed on February 19, 1991, pursuant to 28 U.S.C. § 2255, is hereby DENIED.

IT IS SO ORDERED this 24th day of March, 1992.

H. DALE COOK
United States District Judge

entered

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MONSI LGGRKE, Plaintiff, vs. LOIS BENKULA, BARBARA HUMES, JOHN NELSON and AMERICAN COLLEGE OF CAREERS, LIMITED d/b/a DICKINSON BUSINESS SCHOOL, Defendants.	}	No. 89-C-417-C

ORDER

Plaintiff commenced this action asserting that he was a student studying accounting at Dickinson Business School. He had applied for and had received student financial assistance through three federally sponsored financial assistance programs. Plaintiff asserted that he was provided funds from the federal government totalling $6,625.00 which were paid directly to Dickinson. Plaintiff asserted that the amount paid to Dickinson exceeded the cost of tuition and fees and made demand on Dickinson for the balance, but was refused the same. Plaintiff asserted five claims against Dickinson which have been dismissed through various court proceedings.

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One of plaintiff's claims was asserted under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Defendant now seeks attorney fees under 42 U.S.C. § 1988 as prevailing party under that claim. This attorney fees provision provides:

> In any action or proceeding to enforce a provision of . . . title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

It is well established law, that a prevailing defendant in a civil rights action may only recover attorney fees if the Court finds that plaintiff's action was "vexatious, frivolous, or brought to harass or embarrass the defendant." Melton v. City of Oklahoma City, 879 F.2d 706, 733 (10th Cir. 1989), *on reh'g en banc*, 928 F.2d 920 (10th Cir.).

The Court finds that this is not the appropriate case for an award of attorney fees. It is clear from a reading of the complaint that plaintiff brought this action in good faith and not for the purpose to harass or embarrass the defendant. Even though plaintiff's case is subject to administrative dismissal for failure to prosecute, the Court finds plaintiff commenced his action under the belief that defendant was denying him rights established under federal law.

Accordingly, defendant's motion for attorney fees is denied.

IT IS SO ORDERED this 24th day of March, 1992.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUDY A. NATION,

Plaintiff,

vs.

RAY HOWARD, and the ATTORNEY GENERAL,

Defendants.

No. 91-C-422-E

ORDER

Comes now before the Court Respondents' motion to dismiss Judy Nation's petition for writ of habeas corpus. After a review of the parties' motions and the Report and Recommendation provided by United States Magistrate Judge Jeffery S. Wolfe, the Court finds Defendants' motion to dismiss should be granted.

The United States Supreme Court has held that a state prisoner must exhaust all available administrative remedies before a habeas writ can be granted by the federal court. Duckworth v. Serrano, 102 S.Ct. 18 (1981). This Court recognizes Duckworth as controlling in granting Defendants' motions.

IT IS THEREFORE ORDERED that Defendants' motion to dismiss Plaintiff's petition for writ of habeas corpus is granted.

ORDERED this 25th day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAMSON RESOURCES COMPANY, Plaintiff,	)	
v.	)	No. 91-C-493-E
MAXUS EXPLORATION COMPANY, Defendant.	)	

O R D E R

The Court has before it for consideration the motion of the Defendant, Maxus Exploration Company, to dismiss the above captioned matter pursuant to F.R.C.P. 12(b)(1). Defendant moves this Court to dismiss this action on the ground that the Court lacks jurisdiction because the amount in controversy is less than $50,000.00 exclusive of interest and costs. This being an action for declaratory relief, the parties agree that in order to determine the amount in controversy the Court must look to the pecuniary effect an adverse declaration will have on either party to the lawsuit.

The Defendant also concedes that where a plaintiff has alleged that the amount in controversy exceeds $50,000.00 the Court cannot dismiss the complaint unless it appears to a legal certainty that the claim is really for less than the jurisdictional amount.

The Court after carefully reviewing the record finds that the amount in controversy is really and to a legal certainty less than the jurisdictional amount required in diversity cases.

IT IS THEREFORE ORDERED that the Defendant's motion to dismiss this action pursuant to F.R.C.P. 12(b)(1) is granted.

SO ORDERED on the 24th day of March 1992.

CHIEF JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARCUS ELWAYNE PARTEE,

Plaintiff,

vs.

CITY OF TULSA, et al.,

Defendants.

No. 91-C-304-E

O R D E R

The Court has for consideration the Report and Recommendation (R & R) of the Magistrate, filed January 8, 1992 and the R & R of the Magistrate entered March 12, 1992. In his January 8 R & R the Magistrate recommended that the Motion to Dismiss of District Attorney Moss be granted. The Court concurs. Plaintiff's claims involve the District Attorney's prosecutorial role in judicial proceedings (R & R, Docket 42, p. 3, F.N. #5). In that arena, Mr. Moss is entitled to absolute immunity. Therefore Plaintiff has not stated a claim upon which relief may be granted against the District Attorney. In his R & R of March 12, 1992, the Magistrate recommended that Ronald Holderness' Motion to Dismiss be granted. The Court has reviewed the arguments of the parties in light of the relevant law and affirms that recommendation as well. Plaintiff has failed to substantiate his 42 U.S.C. §1985(3) claim against Holderness with facts material and germane to the claim. His conclusory allegations cannot withstand the 12(b) motion.

IT IS THEREFORE ORDERED that District Attorney Moss' Motion to Dismiss is granted; Ronald Holderness' Motion to Dismiss is granted.

ORDERED this 25th day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 25 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JUANITA BUCHANAN,

Plaintiff,

vs.

ARA SERVICES, INC., et al.,

Defendants.

No. 91-C-239-E

O R D E R

This matter is before the Court on Defendants' Motion to Dismiss and Plaintiff's Application for Leave to File Demand for Jury Trial Out of Time. The Court has considered the arguments of the parties in light of the relevant law and finds that:

1. Statements made by Defendant ARA Services to the OESC are absolutely privileged pursuant to 40 O.S.A. §4-511. Insofar as Plaintiff seeks to state a claim for fraud which does not rely on privileged communications she must do so with particularity pursuant to Rule 9(b), Fed.R.Civ.P.
2. A prayer for punitive damages does not state a cause of action, as Plaintiff now concedes; therefore Count III of Plaintiff's Complaint must be eliminated or refashioned.
3. For reasons delineated in Patterson v. Hudson Farms, Inc., Case No. 88-C-273-E (N.D. Okla. Mar. 1, 1989) the Court declines to permit a Burk claim in conjunction with a Title VII claim.
4. Considering the issues and equities herein, Plaintiff

will not be granted leave to demand a Jury Trial out of time.

IT IS THEREFORE ORDERED that:

1. Defendants' Motion is granted in part;

2. Plaintiff's Application is denied;

3. Plaintiff is directed to file an Amended Complaint which will comport with the Court's rulings herein.

ORDERED this 25th day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 25 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

NORDAM, an Oklahoma General Partnership,	)	
Plaintiff,	)	
vs.	)	Case No. 91-C-347-E
BURBANK AERONAUTICAL CORPORATION I and BURBANK AERONAUTICAL CORPORATION II,	)	
Defendants.	)	

ORDER AND JUDGMENT

On March 19, 1992, the above matter came before this Court for pretrial conference. Plaintiff NORDAM appeared through its counsel, Robert F. Biolchini and Charles Greenough of Doerner, Stuart, Saunders, Daniel & Anderson. Defendants, Burbank Aeronautical Corporation (incorrectly noted in the case style as Burbank Aeronautical Corporation I) and Burbank Aeronautical Corporation II appeared through their counsel, Dixie L. Coffey of McKinney, Stringer & Webster. The Court, having determined that Defendants Burbank Aeronautical Corporation and Burbank Aeronautical Corporation II have not presented any valid defenses to the claims of Plaintiff NORDAM as set forth in NORDAM's Complaint, hereby finds and orders as follows:

1. Judgment is entered against Defendant Burbank Aeronautical Corporation and in favor of Plaintiff NORDAM in the amount of $421,033.47.

2. Judgment is entered against Defendant Burbank Aeronautical Corporation II in favor of Plaintiff NORDAM in the amount of $827,486.86.

3. No execution shall be levied by Plaintiff NORDAM upon this judgment before April 20, 1992.

4. Judgment is entered against the Defendant Burbank Aeronautical Corporation in favor of the Plaintiff NORDAM for pre-judgment interest from September 30, 1990 through March 19, 1992 of $37,027.35 on the Judgment of $421,033.47, with interest on the Judgment for $421,033.47 and Judgment for pre-judgment interest of $37,027.35 from this date forward at the statutory rate as provided for under 28 U.S.C. § 1961, until such Judgments are paid.

5. Judgment is entered against the Defendant Burbank Aeronautical Corporation II in favor of the Plaintiff NORDAM for pre-judgment interest from September 30, 1990 through March 19, 1992 of $64,342.19 on the Judgment of $827,486.86, with interest on the Judgment for $827,486.86 and Judgment for the pre-judgment interest of $64,342.19 from this date forward at the statutory rate as provided for under 28 U.S.C. § 1961, until such Judgments are paid.

6. As prayed for in the Petition, Plaintiff NORDAM is awarded attorney fees against Defendants Burbank Aeronautical Corporation and Burbank Aeronautical Corporation II, in amounts to be determined by this Court upon application by Plaintiff NORDAM.

7. As prayed for in the Petition, Plaintiff NORDAM is awarded its costs against Defendants Burbank Aeronautical Corporation and Burbank Aeronautical Corporation II, in amounts

to be determined by the Court upon application by Plaintiff NORDAM.

JAMES L. ELLISON
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPROVED AS TO FORM:

Robert F. Biolchini, Esq.
John J. Carwile, Esq.
Charles Greenough, Esq.
Doerner, Stuart, Saunders,
Daniel & Anderson
320 South Boston, Suite 500
Tulsa, OK 74103
(918) 582-1211

Dixie L. Coffey, Esq.
McKinney, Stringer & Webster
101 North Broadway
Oklahoma City, OK 73102
(405) 239-6444

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EDNA J. FORCUM,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES,	)	
	)	
Defendant.	)	
	)	CASE NO. 91-C-577-B

ORDER

Upon the motion of the defendant, Secretary of Health and Human Services, by Tony M. Graham, United States Attorney of the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Secretary for further administrative action.

DATED this 25 day of March, 1992.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

TONY M. GRAHAM
United States Attorney

Phil Pinnell

PHIL PINNELL, OBA #7169
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GEORGE MARTIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 91-C-0391-C
	)	
UNITED POSTAL SERVICE,	)	
	)	
Defendant.	)	

ORDER FOR DISMISSAL WITH PREJUDICE

Now on this 24 day of March, 1992, the Court hereby enters an Order dismissing this cause.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILLY JOE HILL,

Plaintiff,

vs.

JAMES L. SAFFLE, et al.,

Defendants.

Case No.: 90-C-1045-C

ORDER

Before the Court are the objections filed by plaintiff, Billy Joe Hill, to the Report and Recommendation of Magistrate Judge Jeffery S. Wolfe. The magistrate recommends that defendants' motion to dismiss be granted.

After careful independent consideration of the record, the issues presented in the motion, and the objections filed by plaintiff Billy Joe Hill, the Court concludes that the Report and Recommendation should be and hereby is affirmed and adopted as the Findings and Conclusions of this Court.

It is therefore ordered that the motion of defendants to dismiss, should be, and hereby is granted.

IT IS SO ORDERED this 24th day of March, 1992.

H. DALE COOK
United States District Judge

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blc

OBA #5026

FILED
MAR 24 1992
CLERK
U.S. DISTRICT COURT
NORTHERN DIST OF OK

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CLAUD LAMB,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. 91-C-615-E
	)	
ABC TERMITE & PEST CONTROL, INC., of Pittsburgh, Kansas,	)	
	)	
Defendant.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties, Claud Lamb, plaintiff, and ABC Termite & Pest Control, Inc., defendant, and pursuant to Federal Rule of Civil Procedure 41 stipulate that the above captioned matter can be dismissed with prejudice, as the parties have reached a full and complete settlement of all claims.

Respectfully submitted,

By _____
JAMES E. SAUNDERS - OBA #12164
6216 S. Lewis, Suite 108
Tulsa, OK 74136
(918) 749-5255

ATTORNEY FOR PLAINTIFF

By _____
CLAUD LAMB, Plaintiff

KNOWLES, KING & SMITH

By Dennis King

DENNIS KING - OBA # 5026
603 Expressway Tower
2431 East 51 Street
Tulsa, OK 74105
(918) 749-5566

ATTORNEY FOR DEFENDANT
ABC TERMITE & PEST CONTROL, INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

ARW EXPLORATION CORPORATION, Plaintiff, v. ANTHANSIOS PAPATHANASOPOLOUS, et al., Defendants,	)	NO. 91-C-836-E

ORDER REMANDING CASE

This Matter comes before the Court upon ARW Exploration Corporation's (hereinafter "ARW") Motion to Remand and Motion for Abstention and Brief in Support (hereinafter "Motion to Remand") and the "Aguirre" Defendant's Response to the Motion to Remand. Upon review of the Motion and Response thereto, this Court finds that the "Aguirre" Defendants have confessed ARW's Motion to Remand, except as to ARW's request for an award of attorneys fees and costs, and that the Motion to Remand should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion to Remand is hereby sustained in this matter. This action is hereby remanded to the District Court for Pawnee County, State of Oklahoma pursuant to 28 U.S.C. § 1447(c).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States Court Clerk for the Northern District of Oklahoma is hereby directed to mail a certified copy of this Order together with any pleadings, motions, orders or other papers filed in this action on or after October 21, 1991 to the Clerk of the District Court of Pawnee County, State of Oklahoma.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court shall retain jurisdiction of ARW's request for an award of attorney fees and costs and determine same.

IT IS SO ORDERED this 24th day of ~~January~~ May, 1992.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

KAREN L. HOWICK & ASSOCIATES
Karen L. Howick, OBA #4414
Anita M. Moorman, OBA #11445
4508 N. Classen Boulevard
Oklahoma City, Oklahoma 73118
(405) 524-2552

01\1140275P.009
gmb

entered

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RESOLUTION TRUST CORPORATION, as Conservator for Cimarron Federal Savings Association,

Plaintiff,

vs.

Albert E. Whitehead, et al.,

Defendants,

and

Federal Deposit Insurance Corporation, in its capacity as Receiver for Phoenix Federal Savings and Loan Association,

Intervenors.

Case No.: 90-C-549-C

FILED

MAR 24 1992

ORDER

The Court has reviewed the objections filed by defendants Albert E. Whitehead and Lacy Whitehead to the Judgment entered by this Court on December 18, 1991.

The Court finds that the objections are without merit and accordingly the Judgment will remain as previously entered.

IT IS SO ORDERED this 24th day of March, 1992.

H. DALE COOK
United States District Judge

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entered

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RESOLUTION TRUST CORPORATION, as Conservator for Cimarron Federal Savings Association, Plaintiff, vs. Albert E. Whitehead, et al., Defendants, and Federal Deposit Insurance Corporation, in its capacity as Receiver for Phoenix Federal Savings and Loan Association, Intervenors.	}	Case No.: 90-C-549-C

FILED

MAR 2 1 1992

Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court is the application of plaintiff Resolution Trust Corporation (RTC) for attorneys fees, pursuant to its claim for foreclosure on certain real estate located in Delaware County, Oklahoma which is subject to a note and mortgage, in default, owned and held by plaintiff RTC as Conservator for Cimarron Federal Savings Association.

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Plaintiff requests the sum of $7,976.69 in attorney fees. No objection has been filed by the defendants. The Court finds the sum reasonable and accordingly grants plaintiff's application.

It is therefore ordered that plaintiff is hereby granted attorney fees in the sum of $7,976.69 over and against the defendants.

IT IS SO ORDERED this 27 day of March, 1992.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEITH L. BELKNAP,

Plaintiff,

vs.

AMWAY CORPORATION,

Defendant.

No. 87-C-795-B

AMENDED ORDER

Before the Court for decision is the Defendant Amway Corporation's Motion for Judgment Notwithstanding the Verdict pursuant to Fed.R.Civ.P. 50 following a jury trial and adverse $150,000.00 verdict and judgment entered June 28, 1991. Following a thorough review of Defendant's motion and the supporting and opposing briefs of legal authorities, the Court concludes that factual issues under proper instructions on the law were submitted to the jury.[1] Thus, the Court hereby OVERRULES Defendant's Motion for Judgment Notwithstanding the Verdict.

DATED this 24 day of March, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[1]The Court previously by its Order of May 23, 1989 sustained a Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56 and concluded therein that no disputed factual issues remained. The Tenth Circuit Court of Appeals reversed and returned the matter for trial on the merits.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

THRIFTY RENT-A-CAR SYSTEM, INC., an Oklahoma corporation,

Plaintiff,

v.

ALTOLEW, INC., a foreign corporation; and TOMMY TUTEN, an individual,

Defendants.

Case No. 91-C-273-B

ADMINISTRATIVE CLOSING ORDER

Thrifty Rent-A-Car System, Inc. ("Thrifty") and the Defendants, Altolew, Inc. and Tommy Tuten, have settled this action pursuant to the terms of a Settlement and Release Agreement dated as of November 22, 1991. Under the terms of that Agreement, the Defendants have agreed to pay Thrifty a sum of money over time. The Agreement gives Thrifty the right to move the Court for the entry of a Judgment in the future, if certain circumstances exist.

It is hereby Ordered that the Clerk administratively terminate this action in his records, without prejudice to the right of Thrifty to reopen this action for the purpose of enforcing its rights under the terms of the Settlement and Release Agreement.

IT IS SO ORDERED this 24 day of March, 1992.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

lc39271

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL D. FARMER,

Petitioner,

v.

DEPARTMENT OF HUMAN SERVICES
THE STATE OF OKLAHOMA,

Respondent.

92-C-51-B

ORDER

Petitioner's application for a writ of habeas corpus is now before the court for initial consideration. Petitioner was convicted in Tulsa County District Court, Case No. JVD-87-17, of two counts of molestation, and sentenced to consecutive ten-year sentences. The convictions are on appeal to the Oklahoma Court of Criminal Appeals.

Petitioner now seeks federal review of the state court's termination of his parental rights to his two adopted minor children. The function of habeas corpus is to test the legality of restraints on a person's liberty. Peyton v. Rowe, 391 U.S. 54, 58 (1968). It cannot be used to review a state court's determination that parental rights be terminated. The writ of habeas corpus does not extend to petitioner under 28 U.S.C. § 2241(c). Petitioner's application for a writ of habeas corpus is denied.

Dated this 23rd day of March, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BLUE CIRCLE CEMENT, INC.,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ROGERS,

Defendant.

No. 91-C-635-E

O R D E R

Comes now before the court for consideration Defendant's motion to dismiss. After review of Defendant's motion and Plaintiff's response to said motion, the Court finds Defendant's motion should be denied.

The Court bases its decision on the unique circumstances involved in this case. Plaintiff, by way of its response to Defendant's motion to dismiss, has demonstrated that: (1) a case and controversy does exist between the parties; and (2) that said controversy does have adverse legal effect on Plaintiff to warrant the Court's attention regarding Plaintiff's request for declaratory judgment. Norvell v. Sangre de Cristo Development Company, Inc., 519 F.2d 370 (Tenth Cir. 1975).

IT IS THEREFORE ORDERED that Defendant's motion to dismiss is denied.

ORDERED this 23rd day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOHN ERVIN FINNEY a/k/a JOHN E. FINNEY; PATRICIA FINNEY a/k/a PATRICIA V. FINNEY; WILLIAM R. PITCOCK; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	CIVIL ACTION NO. 91-C-0104-C

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 19th day of March, 1992. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendant, County Treasurer, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, appears not, having previously filed its Answer disclaiming any right, title, or interest in the subject property; the Defendant, William R. Pitcock, is now deceased and appears not, and Stephen R. Pitcock, Personal Representative of the Estate of William R. Pitcock, Deceased, has executed a Release of Second Mortgage, dated June 21, 1991 and recorded February 13, 1992 in the records of Tulsa County, Oklahoma, in Book 5380, Page 1819, and thus the Defendant, William R. Pitcock, should be dismissed from this

action; and the Defendants, John Ervin Finney a/k/a John E. Finney and Patricia Finney a/k/a Patricia V. Finney, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, John Ervin Finney a/k/a John E. Finney, acknowledged receipt of Summons and Complaint on June 10, 1991; that the Defendant, Patricia Finney a/k/a Patricia V. Finney, acknowledged receipt of Summons and Complaint on June 3, 1991; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on February 21, 1991; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on February 21, 1991.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, filed his Answer on March 11, 1991; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed their Answer on March 11, 1991; the Defendant, William R. Pitcock, Deceased, through Stephen R. Pitcock, Personal Representative of the Estate of William R. Pitcock, executed a Release of Second Mortgage to John E. Finney and Patricia V. Finney; and that the Defendants, John Ervin Finney a/k/a John E. Finney and Patricia Finney a/k/a Patricia V. Finney, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real

property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> A tract of land in part of the Southeast Quarter of the Southeast Quarter (SE/4 SE/4) of Section Thirty-six (36), Township Twenty-one (21) North, Range Twelve (12) East of the Indian Base and Meridian, Tulsa County, State of Oklahoma, according to the U.S. Government Survey thereof, more particularly described as follows:
>
> BEGINNING at a point Nine hundred thirty and Fourteen hundredths (930.14) feet West and Seven Hundred sixty-nine and Twenty-one hundredths (769.21) feet North of the Southeast corner of Section Thirty-six (36), Township Twenty-one (21) North, Range Twelve (12) East; Thence North and parallel to the East line of said Section a distance of One hundred sixty-seven and Thirteen hundredths (167.13) feet to a point; Thence East and parallel to the South line of said Section a distance of Seventy-five (75) feet to a point; Thence South and parallel to the East line of said Section a distance of One hundred sixty-seven and Thirteen hundredths (167.13) feet to a point; Thence West and parallel to the South line of said Section a distance of Seventy-five (75) feet to the Point of Beginning.
>
> Tract Seven (7): BEGINNING at a point Seven hundred eighty and fourteen hundredths (780.14) feet West and Seven hundred sixty-nine and Twenty-one hundredths (769.21) feet North of the Southeast corner of Section Thirty-six (36), Township Twenty-one (21) North, Range Twelve (12) East, Tulsa County, State of Oklahoma; Thence North and parallel to the East line of said Section a distance of One hundred sixty-seven and Thirteen hundredths (167.13) feet to a point; Thence East and parallel to the South line of said Section a distance of Ninety-one and Twenty-two hundredths (91.22) feet to a point; Thence in a Southwesterly direction along the West Right-of-Way line of the Midland Valley Railroad a distance of One hundred Sixty-nine and Thirty-four hundredths (169.34) feet to a point; Thence West and parallel to the South line of said Section a

distance of Sixty-five and Seventy-four hundredths (65.74) feet to the Point of Beginning, Tulsa County, Oklahoma, according to the U.S. Government Survey thereof.

Tract Six (6): BEGINNING at a point Eight hundred fifty-five and Fourteen hundredths (855.14) feet West and Seven hundred sixty-nine and Twenty-one hundredths (769.21) feet North of the Southeast corner of Section Thirty-six (36), Township Twenty-one (21) North, Range Twelve (12) East, Tulsa County, Oklahoma; Thence North and parallel to the East line of said Section a distance of One hundred sixty-seven and Thirteen hundredths (167.13) feet to a point; Thence East and parallel to the South line of said Section a distance of Seventy-five (75) feet to a point; Thence South and parallel to the East line of said Section a distance of One hundred sixty-seven and Thirteen hundredths (167.13) feet to a point; Thence West and parallel to the South line of said Section a distance of Seventy-five (75) feet to the Point of Beginning, according to the U.S. Government Survey thereof.

The Court further finds that on March 14, 1980, the Defendants, John Ervin Finney and Patricia Finney, husband and wife, executed and delivered to Charles F. Curry Company, a Missouri Corporation, their mortgage note in the amount of $28,500.00, payable in monthly installments, with interest thereon at the rate of 13 percent (13%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, John Ervin Finney and Patricia Finney, husband and wife, executed and delivered to Charles F. Curry Company, a Missouri Corporation, a mortgage dated March 14, 1980, covering the above-described property. Said mortgage was recorded on March 18, 1980, in Book 4464, Page 1971, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 11, 1988, Charles F. Curry Company, a Missouri Corporation, assigned the above-described mortgage to the Administrator of Veterans Affairs, which assignment of mortgage was recorded on February 2, 1989, in Book 5164 at Page 2554 in the records of Tulsa County, Oklahoma. At or about the time of the assignment of the mortgage from Charles F. Curry Company to the Administrator of Veterans Affairs, the Administrator of Veterans Affairs entered into a Reamortization Agreement with the Defendants, John Ervin Finney and Patricia Finney, whereby the interest rate of this mortgage was reduced to seven and one-half per cent (7.5%) per annum.

The Court further finds that the Defendants, John Ervin Finney a/k/a John E. Finney and Patricia Finney a/k/a Patricia V. Finney, made default under the terms of the aforesaid note, mortgage, and reamortization agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, John Ervin Finney a/k/a John E. Finney and Patricia Finney a/k/a Patricia V. Finney, are indebted to the Plaintiff in the principal sum of $24,868.29, plus interest at the rate of 7.5 percent per annum from December 1, 1989 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $42.00, plus penalties and interest, for the year of 1990, and ad valorem taxes in the

amount of $40.00, plus penalties and interest, for the year of 1989. Said liens are superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, John Ervin Finney a/k/a John E. Finney and Patricia Finney a/k/a Patricia V. Finney, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, John Ervin Finney a/k/a John E. Finney and Patricia Finney a/k/a Patricia V. Finney, in the principal sum of $24,868.29, plus interest at the rate of 7.5 percent per annum from December 1, 1989 until judgment, plus interest thereafter at the current legal rate of 4.58 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $42.00, plus penalties and interest, for ad valorem taxes for the year 1990; and the amount of $40.00, plus penalties and interest, for ad valorem taxes for the year 1989, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, William R. Pitcock, Deceased, through Stephen R. Pitcock, Personal Representative of the Estate of William R. Pitcock, Deceased; John Ervin Finney a/k/a John E. Finney; Patricia Finney a/k/a Patricia V. Finney; and the Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property; and the Defendant, William R. Pitcock, Deceased, is hereby dismissed as a Defendant herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, John Ervin Finney a/k/a John E. Finney and Patricia Finney a/k/a Patricia V. Finney, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $82.00, plus penalties and interest, for

ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 91-C-104-C
PB/esr

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 91-C-875-C
DAVID M. FRANKEL, Defendant.	)	

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.

2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.

3. The defendant hereby agrees to the entry of Judgment in the principal sum of $5,000.00, plus interest thereafter at the legal rate until paid, plus costs of this action, until paid in full.

4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that DAVID M. FRANKEL will well and truly honor

and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 25th day of March, 1992, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of $300.00, and the sum of $200.00 on or before the 1st day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Debt Collection Unit, 3900 U.S. Courthouse, 333 West 4th Street, Tulsa, Oklahoma 74103.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

4. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

5. The defendant has the right of prepayment of this debt without penalty.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, DAVID M. FRANKEL, in the principal amount of $5,000.00, plus interest

thereafter at the current legal rate of 4.58 percent per annum until paid, plus the costs of this action.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

TONY M. GRAHAM
United States Attorney

3/20/92

KATHLEEN BLISS ADAMS
Assistant United States Attorney

DAVID M. FRANKEL

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

PROFESSIONAL INVESTORS LIFE INSURANCE COMPANY,

Plaintiff,

v.

ANDREW J. STONE, et al.,

Defendants.

Case No. 91-C-756-B

ORDER

Plaintiff's Application to Dismiss Unified Life Insurance With Prejudice is hereby granted and said Defendant Unified Life Insurance is hereby dismissed with prejudice from this cause of action.

S/ THOMAS R. BRETT

JUDGE OF THE DISTRICT COURT

HOWARD AND WIDDOWS, P.C.
Sharon Womack Doty
O.B.A.#14462
2021 South Lewis, Suite 470
Tulsa, Oklahoma 74104
(918) 744-7440

NOT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 23 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

SHELTER INSURANCE COMPANIES,

Plaintiff,

vs.

NOELLA DUNCAN, ADMINISTRATRIX OF THE ESTATE OF MICHAEL EDWARD BATTENFIELD, Deceased, et al.,

Defendants.

No. 91-C-161-E

ORDER AND JUDGMENT

The Court has for consideration the Motion of Defendants to Dismiss. Defendants argue that the matter must be dismissed for want of jurisdiction because the amount in controversy does not exceed $50,000. The Court, after careful review of the record, concurs. It is settled, under Oklahoma law, that where named insureds do not elect excess coverage, they are only entitled to the statutory minimum of protection pursuant to 36 O.S. 1981 §3636. Cofer v. Morton, 784 P.2d 67 (Okla. 1989); Moser v. Liberty Mutual Insurance Co., 731 P.2d 406 (Okla. 1986). Therefore, in this case, even a named insured who did not elect excess coverage under the three policies would only be entitled to $30,000 in the aggregate. Noella Duncan, a named insured on all three policies waived uninsured motorist coverage and would not be entitled to any award. The only issue, then, is what - if any - amount of coverage is the Deceased entitled to claim. It therefore appears to a legal certainty that less than the requisite amount in controversy is at

issue under 28 U.S.C. §1332 and the Court must dismiss this case. Bridgess v. Youree, 436 F.Supp. 458, 459 (W.D. Okla. 1977), citing, inter alia, St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938); City of Boulder v. Synder, 396 F.2d 853 (10th Cir. 1968).

IT IS THEREFORE ORDERED that this declaratory action is dismissed.

ORDERED this 23rd day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BETTY PECK, Plaintiff, vs. MAY'S DRUG STORES, INC., Defendant.	)	Case No. 91-CJ-701 B (District Court Case No. CJ 91 03865)

STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED, by and between counsel for the parties hereto, that:

1. All claims presented by the Plaintiff, Betty Peck, in her complaint shall be dismissed with prejudice against May's Drug Stores, Inc. pursuant to Rule 41(A) of the Federal Rules of Civil Procedure.

2. Each party shall bear its own costs and attorneys' fees.

Dated March 23, 1992.

Merle Tyler
RICHARD D. GIBBONS & ASSOCIATES

ATTORNEYS FOR PLAINTIFF,
BETTY PECK

R. Scott Savage
Terry M. Kollmorgen
MOYERS, MARTIN, SANTEE, IMEL & TETRICK

ATTORNEYS FOR DEFENDANT
MAY'S DRUG STORES, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILLY D. CRAWLEY, et al.,	)	
	)	
Plaintiffs/Appellants,	)	
	)	
vs.	)	No. 91-C-181-E
	)	
UNITED STATES OF AMERICA, ex rel. Manuel Lujan, Jr., Secretary of the Interior for the United States Department of the Interior, et al.,	)	
	)	
Defendants/Appellees.	)	

ORDER AND JUDGMENT

This matter is before the Court as an appeal from a decision rendered by the Regional Solicitor for the Southwest Region of the Department of the Interior.[1] Section 5(a) of the Act of October 21, 1978, 92 Stat. 1660, 1662 provides that appeals to this Court from a determination by the Secretary of the Interior as to the validity of a will of any Osage Indian

> shall be on the record made before the Secretary and his decisions shall be binding and shall not be reversed unless the same is against the clear weight of the evidence or erroneous in law.

In the instant case the Deceased bequeathed her entire estate in fee simple, including her Osage headright, to her husband, a non-Osage. The Osage Tribe of Indians Technical Correction Act of

[1]Plaintiffs/Appellants' objection to Gilbert Mathews being made a party is overruled.

14

1984, Act of October 30, 1984, 98 Stat. 3163 provides at Section 7, that a non-Osage may receive no more than a life estate interest in an Osage headright. Based upon that Section of the 1984 Act the Superintendent of the Osage Indian Agency, who first heard the Petition for Approval of Deceased's will, disapproved the bequest of a headright interest to the non-Osage spouse. He also relied on the Willis case wherein the Regional Solicitor overruled the Superintendent and disallowed a fee simple bequest of a headright interest to a non-Osage. In the Matter of the Will of Martha Ann Willis, Unallotted Osage, Deceased, Case No. IA-T-42 (February 21, 1985). In Willis, the Superintendent had converted the fee simple bequest to a life estate and approved the will in its amended form. But the Regional Solicitor found that in so doing, the Superintendent had exceeded the power granted to the Department of the Interior by Congress to approve or disapprove Osage wills. He cited Tooahnippah v. Hickel, 397 U.S. 598, 90 S.Ct. 1316, 25 L.Ed.2d 600 (1970) as authority for that conclusion. However, Tooahnippah, as the government points out (docket #13, page 6), is clearly distinguishable. There the Regional Solicitor, in direct contravention of Deceased's express wishes not to bequeath anything to his heirs at law because "they have shown no interest in me," disapproved the will and ordered that the estate be distributed to the heirs at law. Id. at 1318-1319. In disapproving the will, the Regional Solicitor explained that he was exercising his "discretion" "to achieve just and equitable treatment of the beneficiaries thereunder and the Decedent's heirs at law." Id. at 1319. The District Court opined that the Regional Solicitor was

painting his authority with a rather broad brush and reversed. The Tenth Circuit viewed the matter as unreviewable and reversed the District Court. The Supreme Court reversed the Tenth Circuit, finding that the Regional Solicitor's actions exceeded his statutory authority under 25 U.S.C. §373:

> [W]e perceive nothing in the statute or its history or purpose that vests in a government official the power to revoke or rewrite a will that reflects a rational testamentary scheme ... simply because of a subjective feeling that the disposition of the estate was not "just and equitable."

Id. at 1323. In Tooahnippah, the Regional Solicitor attempted to subvert the express wishes of the Deceased based upon his own personal notions of equity. That action was found to be arbitrary and capricious. Id. By contrast, the Regional Solicitor in the case at bar, overruled Willis and reversed the decision of the Superintendent by determining that the non-Osage spouse should be granted a life estate in the headright. In so doing he attempted to accede to the express wishes of the Deceased to the extent that it was legally permissible under Section 7 of the 1984 Act. It is black letter law embodied in Oklahoma statute that

> A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.

84 O.S. 1990 §151. Finding the decision of the Regional Solicitor neither "against the clear weight of the evidence" nor "erroneous in law", this Court affirms the decision of the Regional Solicitor. Accordingly, this matter is now dismissed.

ORDERED this 23RD day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MABLE HART,

Plaintiff,

vs.

WAL-MART STORES, INC. and DAVID MOONEYHAN,

Defendants.

No. 91-C-698-C

ORDER

Before the Court is plaintiff's motion to remand, asserting the Court lacks diversity jurisdiction in that the plaintiff and defendant David Mooneyhan are both residents of the State of Oklahoma.

In response, defendants contend that Mooneyhan was improperly joined in this action solely to defeat diversity jurisdiction. The Court has reviewed the file and has determined that subject matter jurisdiction has not been properly invoked for reasons not raised by the parties.

Subject matter jurisdiction is determined as of the time the removal petition is filed in federal court, and must be established from the face of the petition. In this action, the petition for removal states:

> That the matter in dispute exceeds the sum of FIFTY THOUSAND DOLLARS ($50,000.00) exclusive of interest and, in the *(sic)* suit being for a sum greater than FIFTY THOUSAND DOLLARS ($50,000.00), as will more fully appear by Plaintiff's Petition and Plaintiff's Response to Defendant's First Request for Admissions.

Plaintiff's petition was filed in state court on June 21, 1991 and states in the concluding sentence, "WHEREFORE, Plaintiff demands judgment against Defendants in excess of $10,000, interest and costs." Plaintiff's Response to Requests for Admission filed in state court on August 29, 1991, states:

> Request No. 1: Admit that the money in controversy in this action, including all claims for damages made by the Plaintiff does not exceed the sum or value of $50,000.00, exclusive of interest and costs.
>
> Response to Request No. 1: Plaintiff cannot at this time admit or deny Request No. 1. Plaintiff's damages are ongoing and may or may not exceed $50,000.00 total. This response may be supplemented.

Plaintiff does not raise the allegation of amount in controversy as a ground for her motion to remand. In their response, defendant asserts that "[i]t is undisputed that the relief requested in this action exceeds the $50,000.00." Apparently defendant relies on plaintiff's failure to admit or deny the Request for Admission as establishing the requisite amount in controversy. There are no other pleadings of record to substantiate defendant's claim.

The Court finds insufficient defendant's assertion of the requisite amount in controversy to satisfy federal jurisdiction.

Jurisdiction has not been properly alleged by the plaintiff. It is well settled law that a federal court is to consider the amount pleaded in good faith by plaintiff at the time of filing the petition to determine whether the jurisdictional requisites are met. *See, generally,* Seafoam, Inc. v. Barrier Systems, Inc., 830 F.2d 62 (5th Cir. 1987). From the face of the petition, it is clear that the jurisdictional requisites are not met.

Accordingly, plaintiff's motion to remand is hereby granted.

IT IS SO ORDERED this 19th day of March, 1992.

H. DALE COOK
United States District Judge